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No. 02-

IN THE

Supreme Court of the United States

THE BOEING COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA *EX REL.* BRETT ROBY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether the government can hold a contractor liable under the False Claims Act for damages for the loss of a helicopter due to a defective part, notwithstanding that the government, pursuant to a federally-mandated contract clause, expressly relieved the contractor of liability for loss of or damage to government property resulting from defects or deficiencies in the goods supplied.

2. Whether the court below erred in holding, in conflict with the United States Court of Appeals for the Fifth Circuit, that damages recoverable under the False Claims Act, before trebling, are not limited "to the amount wrongfully paid to satisfy the false claim," *United States* v. *Aerodex, Inc.*, 469 F.2d 1003, 1011 (5th Cir. 1972).

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states that it has no parent corporation and no other publicly held corporation owns more than 10% of petitioner's stock.

All parties to the proceeding are listed in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner the Boeing Company ("Boeing") respectfully requests that this Court grant its petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is published at 302 F.3d 637 (6th Cir. 2002), and appears in the Appendix to this petition ("App.") at 1a-26a. The unpublished order of the court of appeals denying the petition for rehearing and rehearing *en banc* appears at App. 103a. The orders of the district court under review are published at 73 F. Supp. 2d 897 (S.D. Ohio 1999) and at 79 F. Supp. 2d 877 (S.D. Ohio 1999), and are reproduced at App. 65a-96a and 27a-64a. The district court's unpublished order certifying an appeal to the court of appeals pursuant to 28 U.S.C. § 1292(b) appears at App. 99a-102a, and the unpublished order of the court of appeals accepting certification appears at App. 97a-98a.

JURISDICTION

The court of appeals entered judgment on September 12, 2002, and denied a timely petition for rehearing and rehearing en banc on January 24, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS OF STATUTORY AND REGULATORY LAW

The relevant provision of the False Claims Act is codified at 31 U.S.C. § 3729, and is reproduced at App. 104a-106a. The relevant provisions of the Federal Acquisition Regulations are codified at 48 C.F.R. §§ 46.802-46.803 and 52.246-24, and are reproduced at App.111a-112a and 124a-126a.

STATEMENT OF THE CASE

This case presents two important questions of federal law that divide the lower courts and have broad ramifications for the allocation of risk and liability in government contracting. First, the United States Court of Appeals for the Sixth Circuit held that the standard limitation-of-liability clause for high-value items in government contracts set forth in the Federal Acquisition Regulations ("FAR") does not apply to limit liability for damages under the False Claims Act ("FCA"). App. 8a-14a. This ruling is in conflict with decisions of other circuits that hold that there is no implied FCA exemption from limitation-of-liability or other clauses in government contracts. This ruling also contravenes the text and history of the regulation, threatens the federal policy of reducing the government's procurement costs through self-insurance, and upsets reliance interests by shifting massive business risks associated with high-value civil and defense procurement from the government to private industry.

Second, the Sixth Circuit held that damages recoverable under the FCA, before trebling, are not limited by the total amount the government paid on the claim alleged to be false. Specifically in this case, which involved a contract to retrofit existing helicopters with upgraded components, the court held that the government's damages would be measured by the full value of a helicopter that was lost due to a defective part, an amount far in excess of the claim submitted by Boeing for the upgrade work. App. 18a-19a. This ruling directly conflicts with the rule established in *United States* v. *Aerodex, Inc.*, 469 F.3d 1003 (5th Cir. 1972), and recently recognized by this Court in *Cook County* v. *United States ex rel. Chandler*, No. 01-1527, 2003 WL 890268 (U.S. Mar. 10, 2003), that consequential damages – defined in *Aerodex* as "additional losses" beyond the amount the government "wrongfully paid," 469 F.3d at 1011 – are not recoverable under the FCA.

Background

1. The FAR are prescribed and administered "jointly by the Secretary of Defense, the Administrator of General Services, and the [NASA] Administrator," and govern the acquisition by contract of supplies and services throughout the federal government. 48 C.F.R. §§ 1.103(b), 1.104. It is the declared policy of the FAR that "[t]he Government will generally act as a self-insurer by relieving contractors, as specified in this subpart, of liability for loss of or damage to property of the Government" from defective supplies or services. *Id.* § 46.803(a).

The FAR prescribe mandatory limitation-of-liability clauses for inclusion in various kinds of government contracts. The most important of these is at issue in this case: the High-Value Item Clause, or HVIC. *Id.* § 52.246-24(a). A "high-value item" is a designated "contract end item that ... has a high unit cost (normally exceeding $100,000 per unit), such as an aircraft, an aircraft engine, a communication system, a computer system, a missile, or a ship." *Id.* § 46.802. The HVIC specifically provides, subject to enumerated exceptions, that:

> notwithstanding any other provision of this contract, the Contractor shall not be liable for loss of or damage to property of the Government (including the supplies delivered under this contract) that (1) occurs after Government acceptance of the supplies delivered under this contract and (2) results from any defects or deficiencies in the supplies.

Id. § 52.246-24(a). The only defects or deficiencies excluded from the limitation of liability are those resulting from "willful misconduct or lack of good faith on the part of any of the Contractor's managerial personnel," a term defined to

encompass only the most senior management of the company. *Id.* § 52.246-24(b).[1]

The policy of government self-insurance embodied in the HVIC dates back to World War II. As the volume of procurement and hence insurance costs expanded dramatically during wartime, the military began self-insuring (1) to obviate the need for contractor insurance and thus reduce the proper pass-through costs to the government of insurance premiums, and (2) to encourage contractors to cooperate fully in investigating the causes of accidents. *Australia* v. *Lockheed Aircraft Corp.*, No. 69-1623-WPG, 1972 U.S. Dist. LEXIS 15742, at *2 (C.D. Cal. Jan. 10, 1972), C.A. J.A. 388-89; 4 U.S. Comm'n on Gov't Procurement, *Report of the Commission on Procurement* 96 (1972) ("*Commission Report*"), C.A. J.A. 406 (noting that government payment of contractor insurance costs would be more expensive than self-insurance because premiums reflect not only the government's loss experience but also administrative costs and insurer profit). Thus, in the postwar era "the general practice of Government in military contracting was to accept risk for loss or damage except for the warranted item that was defective." *Commission Report* at 92, C.A. J.A. 402.

To bring certainty and uniformity to government practice, the Department of Defense in 1971 issued Armed Service Procurement Regulations ("ASPR") that were "aimed at reducing Government procurement costs by limiting the contractor's risk." *Defense Procurement Circular 86* ("DPC 86"), at 1 (1971), C.A. J.A. 434. One ASPR provision,

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[1] Under the HVIC, "Contractor's managerial personnel" means the Contractor's directors, officers, or managerial personnel who supervise or direct "all or substantially all of the Contractor's business"; "all or substantially all of the contractor's operations" at a plant, laboratory, or separate location for performance of the contract; or "[a] separate and complete major industrial operation connected with the performance of this contract." 48 C.F.R. § 52.246-24(b).

entitled "Limitation of Liability for Defects – Major Items," prescribed a standard contract clause for all high-value items, ASPR § 7-104.45(b) (1974), C.A. J.A. 485-86, and was the prototype HVIC regulation. In issuing the regulation, the Department of Defense noted that the limitation-of-liability "policy and the clauses prescribed by this item are worded in terms of liability arising from supplies delivered to the Government," and that "no distinction is made between liability founded in contract and in tort." DPC 86, at 2, C.A. J.A. at 435; *Commission Report* at 96, C.A. J.A. at 406 (express repair/replacement remedies in the clause are "exclusive" remedies for wrongs "both in contract and tort").

The original HVIC set forth in DPC 86 excluded from its liability protection product defects resulting from two kinds of contractor conduct: (1) "fraud or gross negligence as amounts to fraud, on the part of any personnel of the Contractor," and (2) willful misconduct and bad faith on the part of the Company's high management. ASPR § 7-104.45(b) (1971), *in* DPC 86, at 3, C.A. J.A. 437. The first of these exclusions drew protest from defense industry representatives, who explained in comments upon the rule that if a contractor were potentially liable for the fraud of any personnel, the business risk would be "more than any prudent management would be willing to accept without the protection of substantial liability insurance." *ASPR Coverage of Warranties and Consequential Damages* 4, *attached to* Letter from Council of Defense and Space Industry Associations, to Captain E.C. Chapman, Chairman, ASPR Committee (Aug. 12, 1971), C.A. J.A. 464. "[T]he introduction of this exception goes a long way to negating the main purpose of DPC 86" by raising a "serious question whether DPC 86 implementation would have any real effect upon the cost of Contractor insurance included in the overall cost of the Government procurement program." *Id.* at 5, C.A. J.A. 465. The Department responded by deleting the general fraud exception from the HVIC in reissuing the regulation in

1974. ASPR § 7-104.45(b) (1974), C.A. J.A. 485-86; Memorandum from the Department of the Air Force, to the Chairman, ASPR Committee 3 (Jan. 14, 1972), C.A. J.A. 652 (noting that deleting this exception "would eliminate contractor's responsibility for damage to Government property resulting from defective items and caused by the fraud or gross negligence as amounts to fraud of any personnel of the contractor").

The HVIC, without substantive change as to its scope, was subsequently incorporated into the FAR, 46 Fed. Reg. 40,221 (Aug. 7, 1981), and now also extends to certain nondefense government contracts. 48 C.F.R. § 46.801(a). Accordingly, from at least 1974 to the present, the loss or damage to government property from product defects for which a government contractor is liable under the HVIC (and indeed under many other limitation-of-liability clauses under the FAR)[2] are only those that arise from "willful misconduct or lack of good faith on the part of any of the Contractor's managerial personnel." *Id.* § 52.246-24(b).[3]

2. The False Claims Act was first enacted in 1863 "with the principal goal of 'stopping the massive frauds perpetrated by large [private] contractors during the Civil War.'" *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 781 (2000) (bracket in original) (quoting *United States* v. *Bornstein*, 423 U.S. 303, 309 (1976)). "[T]he False Claims Act was not designed to reach every kind of fraud practiced on the Government," *United*

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[2] *See, e.g.*, 48 C.F.R. §§ 52.246-23(b) (defects in supplies not subject to the HVIC), 52.246-25(b) (defects in services), 252.228-7001(b) ("damage to, or loss or destruction of aircraft in the open, during operation, and in flight" prior to delivery to the government), 52.245-2(g) (loss or destruction of government-furnished property in the hands of the contractor), and 52.245-8(c) (loss of or damage to government facilities).

[3] The re-promulgation of section 52.246-24 in 1997 did not amend the HVIC in any way that is material here. *See* 61 Fed. Reg. 67,408, 67,426 (Dec. 20, 1996).

States v. *McNinch*, 356 U.S. 595, 599 (1958), but was enacted with the specific purpose "to stop this plundering of the public treasury," *id.*, and "to protect the funds and property of the Government *from fraudulent claims*." *Rainwater* v. *United States*, 356 U.S. 590, 592 (1958) (emphasis added). The FCA created a statutory remedy for fraudulently obtaining money and property that supplemented the common law. *United States* v. *Mead*, 426 F.2d 118, 123 n.4 (9th Cir. 1970); *United States* v. *Borin*, 209 F.2d 145, 148 (5th Cir. 1954).

As amended, section 2(a) of the FCA creates civil liability for any person who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval," or who makes certain false statements or engages in other defined conduct to obtain fraudulently the money or property of the government. 31 U.S.C. § 3729(a). The scienter required under the current FCA is less than that required for common law fraud; the term "knowingly" is defined to include not only actual knowledge of the relevant information and deliberate ignorance, but also "reckless disregard of the truth or falsity of the information." *Id.* § 3729(b).

From its inception, the FCA allowed recovery of damages sustained from the prohibited acts in order "to provide for *restitution to the government of money taken from it by fraud*," and authorized doubling of those damages "to make sure that the government would be made completely whole." *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 551-52 (1943) (emphasis added). It had long been held, however, that any "additional losses" sustained by the government beyond what it "wrongfully paid" were not within the purview of the Act. *Aerodex*, 469 F.3d at 1011. As this Court has recognized, during the 1986 revisions of the Act, a provision of the House bill that purported to overrule the *Aerodex* rule and provide for the recovery of such

"consequential damages" was rejected in the House-Senate conference. *Cook County*, 2003 WL 890268, at *7 & n.9; *infra* at 26-28. Congress opted instead to provide for the trebling of damages "as a substitute for consequential damages." *Cook County*, 2003 WL 890268, at *7 n.9. Accordingly, the FCA, as amended, limits recovery to "3 times the amount of damages which the Government sustains *because of the [prohibited] act*." 31 U.S.C. § 3729(a) (emphasis added).

Facts and Proceedings Below

1. Boeing has long supplied helicopters to the United States military. In the 1970's, Boeing commenced research and development of a "next-generation" alloy to allow the manufacture of extremely durable helicopter gears that would extend service lives and withstand harsh battlefield conditions (including loss of engine lubrication). Boeing succeeded in developing that technology, which has been incorporated in, among other products, the Army's Chinook 47 ("CH-47") line of military airlift helicopters.

In 1985 and 1989, Boeing entered into two contracts with the Army to upgrade certain components and systems of the Army's CH-47 helicopters to a more advanced "D-Model" configuration. This task involved modernizing flight control, hydraulic, electrical, and drive systems (including redesigned transmissions). The Army requested that Boeing rely on two sources to manufacture the helicopter gears, and, after a rigorous qualification process, the Army approved the Speco Corporation as one of those sources. Because the hardness of the new advanced alloy posed significant challenges in machining the gears, Boeing set up an elaborate (and government-approved) quality assurance process at Speco that numerous witnesses testified without contradiction was unprecedented in its stringency. Army inspectors were deeply involved in this process.

Among the 359 remanufactured helicopters that Boeing upgraded was No. 89-0165. Boeing invoiced the government

$4.1 million for the upgrade of this helicopter in 1990. In 1991, this helicopter made an emergency landing in Saudi Arabia during Operation Desert Storm. None of the crew suffered any serious injury, but the helicopter and its contents were destroyed in an ensuing fire. A joint Boeing-Army study later determined that the cause of the mishap was a previously undetected microscopic manufacturing defect in a gear made by Speco.

2. In 1997, the United States intervened in a *qui tam* action filed in the United States District Court for the Southern District of Ohio under the FCA by relator Brett Roby, a former Speco employee. The government's amended complaint alleged that Boeing installed nonconforming Speco-made gears in Army helicopters in reckless disregard of information that the gears might contain microscopic manufacturing defects, and that Boeing therefore submitted false claims for payment because the claims certified contract compliance. App. 8a ("The allegedly fraudulent act in this case is Boeing's 'false[] represent[ation] that the helicopters conformed to contract requirements and fail[ure] to disclose their faulty manufacture to the United States Government.'" (alterations in original) (quoting Am. Compl. at ¶ 3)). The allegations of recklessness centered upon the response of Boeing quality-assurance personnel to information about certain manufacturing processes employed by Speco. For the lost Saudi helicopter, the government claimed damages in excess of $38 million (treble the value of a new CH-47D helicopter). *Id.* at 31a & n.7.

As the court of appeals noted, Boeing "'vigorously denies' any knowing submission of a false claim in this case," App. 8a n.3, but those fact issues were never tried. On cross-motions for partial summary judgment, the district court first ruled that the HVIC did not operate to restrict liability for damages under the FCA. *Id.* at 90a-95a. On the issue of damages, the district court held that consequential damages were unavailable under the FCA. *Id.* at 54a-56a. Nonethe-

less, disregarding the distinction between direct and consequential damages, the district court held that the government was entitled to prove all foreseeable damages proximately caused by the filing of the false claim, including "the replacement and repair value of the destroyed and damaged helicopters, as well as the related costs and expenses associated with it." *Id.* at 56a.

After these rulings, the parties entered into a settlement (1) resolving other claims unrelated to the loss of the Saudi helicopter, (2) preserving the right of Boeing to appeal the HVIC and FCA damages rulings as to the Saudi helicopter claim, and (3) providing for liquidated damages, contingent on the disposition of the issues appealed. App. 3a-4a. As part of the settlement, the parties stipulated, *inter alia*, that the HVIC exception for misconduct by "Contractor managerial personnel" was not at issue in this case, and that the loss of the helicopter was caused by the defective Speco gear. *Id.* at 9a. The district court certified an interlocutory appeal on both the HVIC and FCA issues, and the court of appeals accepted jurisdiction. *Id.* at 98a, 100a-101a.

3. A divided Sixth Circuit affirmed. On the HVIC issue, the majority acknowledged the "fairly broad terms" of the HVIC's limitation on liability, but refused to construe the clause to limit liability under the FCA. App. 8a. The majority ruled simply that "[b]ecause nothing in the HVIC suggests that its limitation of contractor liability covers statutory violations, we hold that the district court did not err in concluding that the HVIC does not provide a defense to damages sought under the FCA." *Id.* at 10a. The majority conceded that "[o]n one level, the dispute in this case is essentially the same as the one in" *United States* v. *United States Cartridge Co.*, 198 F.2d 456 (8th Cir. 1952), see App. 10a, in which the Eighth Circuit held that a broad limitation-of-liability clause that did not reference the FCA nonetheless precluded FCA liability. 198 F.2d at 465. Relying upon the allegedly different context of *United States Cartridge* (a

wartime contract with government supervision of production), however, the majority distinguished the present case based on its view that the helicopter remanufacturing contract was one performed "almost entirely during peacetime" and that "Boeing was not subject to government supervision or control." App. 12a.

On the issue of FCA damages, the majority purported to apply the "'diminished value'" test of *United States* v. *Bornstein*, 423 U.S. 303 (1976), under which the court will "subtract the market value of what the Government received from what it was promised." App. 16a. The majority then equated the market value of what "was promised" in the instant case with the market value of a fully-conforming remanufactured helicopter. *Id.* at 16a-17a. It then held that the market value of the helicopter "as received" was zero because the defective gear was flight-critical. *Id.* at 18a. The government was therefore entitled to recover treble "the value that Aircraft 89-0165 would have had if it had been of the specified quality." *Id.* at 19a.

Judge Boggs dissented on the grounds that the HVIC foreclosed recovery for the lost helicopter: "the Government [is] trying to do exactly what the plain and obvious wording of its contractual term says it will not do: recover from 'the Contractor' for the 'loss of or damage to property of the Government.'" App. 20a. Judge Boggs refuted the majority's claim that the HVIC could not be harmonized with the FCA:

> The HVIC does not overwrite or preempt the FCA by relieving contractors of liability for fraud. The FCA is still applicable to the contractors; the only difference made by the HVIC is that the Government has agreed that it will not hold the contractors liable under any theory for the value of the helicopter. Accordingly, the Government can sue the contractors under the FCA and seek a finding of liability for fraud; the Government merely can not seek damages for the value of the

> equipment. The other penalties under the FCA are still applicable, and if the Government feels that it has been defrauded, it may debar Boeing from Government contracts.

Id. at 21a-22a. Moreover, recounting the history of the HVIC outlined above, Judge Boggs declared that the majority's decision was contrary to the purpose of the HVIC, which was to reduce government procurement costs by eliminating the need for contractor insurance. *Id.* at 25a. Under the majority's decision, "contractors will have to insure against potential FCA liability for treble damages for the loss of high-value items resulting from actions that might be held to be fraudulent on the part of any personnel," and "[p]resumably, this cost will be passed on to the Government." *Id.*

REASONS FOR GRANTING THE PETITION

Review by this Court of both of the Sixth Circuit's separate holdings is necessary (i) to resolve conflicts between the Sixth and other Circuits with respect to each such holding, and (ii) to provide for the uniform resolution of critical and unsettled questions relating to the relationship between the United States and its suppliers of major military systems and other materiel.

The Sixth Circuit's holding that the limitation of liability plainly expressed in the High Value Items Clause ("HVIC") does not in any way limit a contractor's liability for damages in an FCA case is irreconcilable with Eighth Circuit precedent. Moreover, the construction of the HVIC espoused by the court below vitiates the settled contractual understanding between the government and its suppliers of major weapons systems and other equipment that the government generally bears the risk of loss of "high value" items (such as ships, missiles or, as in this case, aircraft) resulting from defects in their manufacture. Thus, the decision below, if not reviewed, will force the government's

most important suppliers to decide whether to obtain commercial insurance against the risk of loss of every airplane, ship or other multi-million dollar system they manufacture and to charge the very high cost of such insurance to the government, as the FAR permits;[4] to self-insure and risk insolvency; or to cease doing business with the government altogether.

The Sixth Circuit's second holding – that damages recoverable under the FCA, before trebling, are not limited in any way by the total amount paid by the government on the claim alleged to be false – conflicts squarely with the Fifth Circuit's holding that baseline damages under the FCA are limited to "the amount wrongfully paid to satisfy the false claim." *Aerodex*, 469 F.2d at 1011. Moreover, as shown in detail *infra* at 22-30, the Sixth Circuit has done in this case precisely what Congress declined to do in the 1986 Amendments to the FCA: namely, overrule *Aerodex* and permit consequential damages under the FCA.

Thus, the decision below deals a double blow to longstanding government procurement policies and those who do business with the government. First, by eviscerating the HVIC, it upsets decades-old reliance interests of government contractors and threatens to increase government procurement costs. Second, the Sixth Circuit's dramatic expansion of FCA damages leaves contractors faced with nearly unbounded exposure to three times potentially massive damages (such as an entire aircraft), no matter how small their claim. The Court should grant certiorari to foster and restore uniformity among the courts, and prevent undue disruption of the contractual relationships between the United States and its suppliers, large and small, of military and other equipment.

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[4] The costs of insurance for the risk of loss of or damage to government property may be passed through to the extent a contractor is liable for such loss or damage. 48 C.F.R. § 31.205-19(a)(2)(iv).

I. THIS COURT SHOULD RESOLVE THE CONFLICT OVER IMPLIED FCA EXEMPTIONS FROM GOVERNMENT CONTRACTS.

The decision of the divided court of appeals creates a substantial conflict among the circuits about whether the HVIC operates as limitation on damages under the FCA. In holding that it does not, the Sixth Circuit has read an exception into the Clause that is not encompassed in its plain language, thereby disrupting the settled expectations of defense contractors about the clear rules that have governed contractor liability for the past 50 years. Federal regulation requires the HVIC to be included in virtually every government contract for the purchase of high-end military systems such as planes, ships and missiles, as well as many civilian systems. 48 C.F.R. § 46.803(b). The Sixth Circuit's unprecedented decision negates the FAR's carefully crafted rules regarding assumption of risk for damages to these critical defense systems, and thus leaves military contracting in a state of great uncertainty at a particularly critical juncture in our Nation's diplomatic and military history.

1. The HVIC expressly states that a "Contractor *shall not be liable* for loss of or damage to property of the Government ... that (1) occurs after Government acceptance of the supplies delivered under this contract and (2) results from any defects or deficiencies in the supplies." *Id.* § 52.246-24 (emphasis added). As even the majority below conceded, this provision plainly "limits contractor liability for high-value items in fairly broad terms." App. 8a. Despite the plain language and history of the HVIC, see *supra* at 3-6, the majority held that the protections of the HVIC did not extend to damages arising under the False Claims Act, because "nothing in the HVIC suggests that its limitation of contractor liability covers statutory violations." App. 10a. Thus, as Judge Boggs emphasized in his dissenting opinion below:

> Put most simply, this case is about the Government trying to do exactly what the plain and obvious wording

> of its contractual term says it will not do: recover from "the Contractor" for the "loss of or damage to property of the Government."

Id. at 20a (Boggs, J., dissenting).

The decision below is in direct conflict with the United States Court of Appeals for the Eighth Circuit, which refused to exempt FCA claims from an express contractual provision limiting a defense contractor's liability to the government. *United States* v. *United States Cartridge Co.*, 198 F.2d 456 (8th Cir. 1952). *United States Cartridge* involved a contract for the mass production of ammunition that contained a clause strikingly similar to (although predating) the HVIC; it provided "'that the Contractor shall not be liable'" for any loss or damage to government property unless it resulted from the misconduct "'of the corporate officers of the Contractor or of other representatives of the Contractor having supervision and direction of the operation of the Plant as a whole.'" *Id.* at 461. The government brought an action against the contractor under the FCA, arguing that if the contract clause were "construed to exempt" the contractor from liability for fraud, it would be "void because in derogation of the False Claims Statute, [and] contrary to public policy." *Id.*

The Eighth Circuit rejected the government's argument and affirmed the dismissal of its FCA claims. The court stated that "[t]he Secretary of War ... unquestionably by the contract in suit undertook to allocate the risks and obligations which were to be assumed by the [contractor] and those which were to be borne by the Government." *Id.* at 465. The Secretary was empowered to decide that the national interest was best served by the government bearing the risk of fraud by non-managerial employees, and the government would be held to the terms of the bargain it struck. *Id.*

In direct conflict with this ruling, the Sixth Circuit has refused to allow a similar contractual allocation of risk, holding that "[t]he HVIC does not foreclose the FCA as a

means for the Government to recover damages." App. 14a; see also *id.* at 20a (objecting to the majority's holding "that the Government can seek under the FCA exactly what it has contracted through the HVIC not to" (Boggs, J., dissenting)). Indeed, the majority even acknowledges that "the dispute in this case is essentially the same as the one" in *United States Cartridge*. *Id.* at 10a.

The majority sought to distinguish *United States Cartridge* on the basis that the contract in question was a response to a wartime crisis and involved unusual government supervision, but its proposed distinction is unavailing.[5] First, because of its experience in World War II, the Department of Defense deemed it to be in the government's interest to formalize and extend its policy of self-insuring to virtually all contracts for the procurement of high-value defense systems. Hence, the HVIC has applied since its inception to all high-value weapons procurement (including any wartime procurements), regardless of the nature of the government's involvement in the execution of the contract. Second, Congress has drawn no distinction between the Secretary's statutory power to enter into procurement contracts during war and peacetime, and there is no substantive difference between the Secretary's statutory powers now and at the time of the *United States Cartridge* contract. Compare 10 U.S.C. §§ 2202, 2302-2331, with 198 F.2d at 463; see also 41 U.S.C. § 405(a). Third, these are high-value *military* systems, purchased by the government to assist in the nation's defense and, if necessary, to utilize in armed conflict. In fact, the helicopter in this case was lost in Saudi Arabia in the midst of Operation Desert

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[5] The Sixth Circuit also suggested that "Boeing was not subject to Government supervision or control" to the same extent as the U.S. Cartridge Company, and therefore that the two contracts could be distinguished on that basis. App. 12a. To the contrary, as is true with many high-value defense contracts in the modern era, government supervision of contract performance was extensive and included the placement of numerous government quality assurance representatives and inspectors at both Speco and Boeing. C.A. J.A. 334, 761.

Storm. The meaning of plain contract language cannot shift depending on the happenstance of whether the contract is signed – typically years before the damage – when the nation is at war or at peace.

Most fundamentally, the Eighth Circuit discussed the special circumstances of the *United States Cartridge* contract to explain why it was not against public policy for the Secretary "to limit the defendant's risks in that regard to whatever extent he deemed necessary in order to secure its managerial services to produce, under Government supervision, ammunition for the armed forces." 198 F.2d at 465. The risks facing that contractor may have been *different* from the contractor risks (catastrophic loss) that animate the HVIC, but that difference in no way affects the core holding of *United States Cartridge*: when the Department of Defense, pursuant to statutory authority, determines that it is in the national interest for the government to assume the risk of loss from nonmanagerial fraud through unqualified limitation-of-liability clauses, those clauses must be enforced by their plain terms even against claims for damages under the FCA. The government can and should be held to the terms of its bargain. The decision of the majority below, by refusing to enforce the plain language of the HVIC, directly conflicts with *United States Cartridge*. See also *United States* v. *Winstar Corp.*, 518 U.S. 839, 909 (1996) (plurality) (noting that an "allocation of risk" to the government "that was essential to the contract between the parties" must be enforced according to its terms).

The majority's decision also conflicts with the Fourth Circuit's recent decision in *United States* v. *Bankers Insurance Co.*, 245 F.3d 315 (4th Cir. 2001). In that case, the government argued that it should not be bound by a contractual provision mandating submission of a dispute to arbitration because it wished to pursue a separate statutory FCA claim. The government argued that the "FCA claim [was] premised on a unique statutory right," *id.* at 325, and

that enforcement of the arbitration provision would dilute "the statutory authority of the Attorney General as the exclusive enforcer of the FCA." *Id.* at 323-24.

In rejecting the government's arguments, the Fourth Circuit began with the "well settled" principle "that, when the United States is a party to a contract, ordinary principles governing contracts and their interpretation remain applicable." *Id.* at 321. The court then held that "[t]he Government should comply with its contract obligations, and it cannot avoid them merely by invoking a statutory civil claim, such as one contemplated under the FCA." *Id.* at 324. The majority below attempted to distinguish *Bankers Insurance* on the ground that the contract provision there only *delayed* the government's FCA claim, because the government retained the right to litigate after arbitration. App. 12a-13a. But, as Judge Boggs rightly observed, this is a false distinction, because "the reasoning of *Bankers Insurance* still applies to the case at hand" and commands a different result. *Id.* at 22a n.2. The Sixth Circuit in this case condoned the government's attempt to do what the Fourth Circuit ruled it cannot: evade enforcement of the plain language of a contractual provision because of the existence of an alleged FCA violation.

The Sixth Circuit's decision is not justified by the need to reconcile the HVIC with the FCA, as it suggests. App. 7a, 13a. As Judge Boggs pointed out, the HVIC does not prevent enforcement of the FCA, it merely prevents the government from recovering one element of loss for which the government by contract explicitly assumed the risk as a matter of sound and longstanding policy. *Id.* at 21a-22a. Such a result, Judge Boggs observed, does not override the FCA; it merely "uphold[s] the obvious coverage of a standard assumption of risk clause, under which the Government agreed not to exercise certain rights it would otherwise have in exchange for a benefit." *Id.* at 25a. The government, moreover, can still recover FCA damages other than for the

loss of the helicopter; collect civil penalties; proceed criminally; and debar the violator from government contracting. *Id.* at 21a-22a, 25a.

2. The conflicts of authority identified above alone justify certiorari, but the overriding importance of this issue makes this Court's immediate review imperative. Assumption of risk clauses "ensure[] ... the government is able to obtain needed goods and services from parties who might otherwise, quite rightly, be unwilling to undertake the risk of government contracting." *Winstar*, 518 U.S. at 913 (Breyer, J., concurring). Yet, under the Sixth Circuit's ruling, not just the HVIC but numerous assumption-of-risk clauses incorporated in government contracts pursuant to the FAR, *supra* at n. 2, are ineffective against FCA damages claims.

The exemption of FCA damages claims from the HVIC creates broad exposure for contractors. Contractor liability under the FCA is not limited to common law fraud, but now includes "deliberate ignorance" and "reckless disregard of the truth or falsity of the information," 31 U.S.C. § 3729(b), which the government in this and other cases has asserted amounts to gross negligence. In the aftermath of an accident, even good-faith actions on mission-critical parts (which are ubiquitous in complex weapons systems) can be recast as "reckless" conduct in breach of contract. The act of a single low-level employee, among perhaps thousands who may work on a major weapon system, can thus create substantial liability for contractors under the treble damages provision of the FCA.

The reliance interests undercut by the decision below are staggering. Given the clear Department of Defense policy of self-insurance that has been in effect since World War II, and the amendment of the HVIC in 1974 to eliminate an exception for fraud by all personnel save the most senior managers, contractors have forgone the purchase of insurance that would protect against risk of damage or loss of high-

value government items. Now, as a result of the Sixth Circuit's unprecedented and unexpected decision, contractors face potentially massive retroactive liability against which they could have, and surely would have, insured. See, *e.g.*, *North Bank* v. *Cincinnati Ins. Cos.*, 125 F.3d 983, 988 (6th Cir. 1997) (intentional misconduct insurable); *Andover Newton Theological Sch., Inc.* v. *Continental Cas. Co.*, 930 F.2d 89, 91 (1st Cir. 1991) (same). This exposure encompasses almost every major space and military contract of recent vintage: contracts that may have been executed many years (even decades) ago but because of their complexity are still being performed, as well as the fully performed contracts that are still subject to the lengthy FCA limitations period (which extends up to 10 years from the date of violation, 31 U.S.C. § 3731(b)).

The financial risks to contractors and subcontractors who supply, retrofit or repair aerospace and defense systems dwarf even the substantial liability the government sought to impose here. A B-2 Bomber or a Virginia Attack Submarine has a unit cost of over $2 billion; a LPD-17 Landing Ship or a DDG-51 Destroyer nearly $1 billion; a J-STARS Reconnaisance Aircraft $560 million; a Trident missile $61 million. Center for Def. Info., *Military Almanac 2001-2002*, at 36 (2002). Spacecraft and satellite risks are of similar or greater magnitude. Risk is not limited to total loss of the craft; damage to even a single subsystem may run well into the millions of dollars. All these potentially ruinous losses are subject to trebling under the FCA if, the government maintains, as little as gross negligence by any employee is found in relation to a defective part.

The decision below immediately shifts billions of dollars of risk from the government to private industry. Given the plain meaning and history of the HVIC, it would be manifestly unfair to allow the government to reap such a windfall at contractors' expense. Over the last half century, the government has avoided significantly higher procurement

costs by inducing contractors and subcontractors to forgo the purchase of insurance through a promise of self-insurance. Now in the face of a significant loss, the government has disclaimed its previous bargain and sought to impose an unbargained-for liability on its contractors. At a minimum, the legality of such massive risk-shifting is an issue that should be decided by this Court, and not left in the hands of a badly divided Sixth Circuit.

The prospective effects of the decision below are equally intolerable because of the pervasive uncertainty in government contracting that will persist until this Court settles the scope of the HVIC and other FAR limitation-of-liability clauses. No contractor can accurately price bids for weapons or other major systems without knowing its liability risks. Furthermore, so long as it is uncertain whether the HVIC operates to limit damages under the FCA, no prudent contractor will leave potentially ruinous risks uninsured where insurance can be purchased. Indeed, not only prime contractors, but also subcontractors will now have to insure, because each subcontractor will face potential liability to prime contractors that no longer would be protected by the HVIC. The resulting pyramid of insurance "premiums for product liability insurance protection throughout the complete subcontracting chain" for risks of great magnitude would add vast sums to government procurement costs, *Commission Report* at 97, C.A. J.A. 407, which defeats the very purpose of the HVIC program. Where commercial insurance is unavailable, companies that cannot afford the risk of self-insurance (particularly suppliers of low-value but mission-critical parts) may abandon government contracting; those that can self-insure must raise contract prices to cover the risks.

Judge Boggs recognized the disastrous implications of the majority's holding in his dissent:

> [U]nder [the court's decision today], contractors will have to insure against potential FCA liability for treble

> damages for the loss of high-value items resulting from actions that might be held to be fraudulent on the part of any personnel. Presumably, this cost will be passed on to the Government.

App. 25a (Boggs, J., dissenting). This Court should review the decision below, which manifestly undermines the HVIC regulation that has been a cornerstone of government procurement policy, as well as decades of reasonable reliance by contractors upon that regulation.

II. THIS COURT SHOULD RESOLVE WHETHER FCA DAMAGES, BEFORE TREBLING, CAN EXCEED THE TOTAL AMOUNT PAID OUT BY REASON OF THE CLAIM ALLEGED TO BE FALSE.

The Sixth Circuit's holding on damages recoverable under the FCA deepens the divisions among the Circuits and adds substantially to the uncertainty and lack of uniformity in the courts concerning the measure of damages under the FCA. In particular, the Sixth Circuit's decision is out of step with *United States* v. *Bornstein*, 423 U.S. 303 (1976) and *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943), and conflicts squarely with the Fifth Circuit's holding in *Aerodex* that "a proper application of the [FCA] damage provision limits the government's claim to the amount that was paid out by reason of the false claim." 469 F.2d at 1011.[6] *Aerodex* teaches that damages that exceed the amount the government paid for a defective product, such as the cost of repairing the defect or replacing the product, may be recoverable by the government under breach of warranty, common law fraud or other theories, but they are not the measure of baseline damages to be multiplied under the FCA. Moreover, by

[6] At the time of the *Aerodex* decision, the FCA referred to damages sustained "by reason of" the defendant's act. This phrase was changed to the current language, "because of," 31 U.S.C. § 3729(a), as part of a recodification in 1982, but the change was not intended to make any "substantive changes in the law." *See* H.R. Rep. No. 97-651, at 2 (1982).

allowing damages, before trebling, that are a multiple of the amount of the allegedly false claim, the Sixth Circuit works a change in the FCA that Congress expressly rejected in connection with the comprehensive 1986 Amendments to the FCA, when it specifically refused to overrule *Aerodex*, and rejected consequential damages under the Act.

No court has ever before ruled that, under the damages formulation endorsed by this Court in *Bornstein*, see *infra* at n. 11, a supplier of remanufacturing services and upgraded components could be liable under the FCA for three times the value of an entire aircraft if a single upgraded part is defective. In that sense, the Sixth Circuit's ruling is at odds with every court that has addressed these issues. By dramatically expanding a contractor's liability under the *Bornstein* rule, the Sixth Circuit's opinion threatens disastrous consequences for government contractors and underscores the need for this Court to speak authoritatively on this issue.

1. This Court long has recognized that "the chief purpose of the [FCA] was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum [as a penalty for each false claim] was chosen to make sure that the government would be made completely whole." *Hess*, 317 U.S. at 551-52.[7] Thus, the "device" in the FCA for ensuring complete recovery by the government is to provide for multiplication of the damages caused by the act of fraudulently inducing the government to pay out money, *not* to provide for recovery of all "reasonably foreseeable" damages that are the consequence of the facts that render the claim false, then trebling *those* damages. In the current Term, sixty years after *Hess* and in light of the 1986 Amendments to the FCA, the Court has again recognized this principle: "The treble damage provision [of the FCA] was, in a way, adopted by

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[7] As noted *supra* at 7-8, the 1986 FCA Amendments changed the statute to provide for treble, rather than double, damages. 31 U.S.C. § 3729(a).

Congress as a substitute for consequential damages." *Cook County*, 2003 WL 890268, at *7 n.9.

The Fifth Circuit's decision in *Aerodex* comports completely with this analysis, while the Sixth Circuit's decision in the instant case directly conflicts with it. In *Aerodex* the defendant had sold aircraft engine bearings to the Navy that were mislabeled so as to appear to meet a contract specification that they did not, in fact, meet. The Navy paid a total of $27,000 for the bearings themselves, but after the discrepancy was discovered, the Navy incurred an additional cost of nearly $161,000 in removing and replacing bearings that had been installed. 469 F.2d at 1010. The district court had computed the government's damages by first adding these two amounts together, before doubling (as the FCA then provided) the resultant sum. The Fifth Circuit reversed:

> Upon careful analysis, we hold that the language of the False Claims Act does not include consequential damages resulting from delivery of defective goods. The statute assesses double damages attributable to the "act," which in this case is the submission of the false vouchers. The submission of these vouchers was not the cause of the government's consequential damages. The delivery and installation of the bearings in the airplanes, not the filing of the false claim, caused the consequential damages.

Id. at 1011. Accordingly, the Fifth Circuit ruled that "a proper application of the [FCA] damage provision limits the government's claim to the amount that was paid out by reason of the false claim." *Id.*

The decision of the Sixth Circuit in the instant case is in irreconcilable conflict with *Aerodex*.[8] First and most obviously, the Sixth Circuit here has held that the FCA permits recovery of damages before trebling for the value of

[8] Although all parties in the court below briefed the *Aerodex* issues extensively, the Sixth Circuit does not even refer to the case in its opinion.

an entire remanufactured aircraft "if it had been of the specified quality" (possibly as much as $13 million), App. 19a & n.9, which is far in excess of the *Aerodex* limit of the amount paid out by reason of the claim alleged to be false (here, $4.1 million). Second, the Sixth Circuit has staked out a construction of the FCA that cannot be squared either with *Aerodex*, with the plain language of the statute, or with legislative intent. As the *Aerodex* court reasons, the plain language of the FCA provides for recovery of the damages that the government "sustains because of the act" of the defendant – that is, the submission of a false claim for payment. 31 U.S.C. § 3729(a). The damage sustained by the government because of the submission of a false claim is the payment of money that the government should not have had to pay. 469 F.2d at 1011. The consequences of the facts that make the claim false (in *Aerodex*, the fact that the bearings were defective) may cause other damages to the government, even the loss of an aircraft. Those damages, even if recoverable under a number of other theories, are not recoverable under the FCA.[9] *Id.* The FCA is about recovering money the government was fraudulently induced to pay, not about fashioning remedies for the consequences of allegedly substandard parts. See *Hess*, 317 U.S. at 551-52.

The Sixth Circuit's decision sidesteps the causation language of the FCA's damages provision and jumps straight to the conclusion that the submission of a false claim

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[9] In fact, the *Aerodex* court permitted the government in that case to recover, on a breach of warranty theory, precisely the same consequential damages it disallowed under the FCA. 469 F.2d at 1011-12. The government's amended complaint in the instant case (as is typical in cases of this nature) also contains a common law fraud count, *see* C.A. J.A. 118, and consequential damages typically are recoverable in common law fraud cases. *See Restatement (Second) of Torts* § 549(1)(b) & cmt. d (1976). Thus, if the HVIC were not a bar, the government would have other avenues for fully recovering its consequential damages, but should not be permitted first to add consequential damages to the contract price, then recover three times that combined amount under the FCA.

"caused" the helicopter in question to crash: "Although the loss of [the helicopter] occurred after Government acceptance and resulted from the defective Speco gear, it was actually caused by Boeing's initial misrepresentation that the helicopter conformed to contract requirements." App. 9a-10a. This analysis confuses and conflates the damage caused by submission of the false claim, *i.e.*, the unjustified payment of money, and the accident caused by the underlying product defect, independent of any certification of quality or product conformance.

As the analysis of the FCA's language in *Aerodex* makes clear, the conduct at which the False Claims Act is directed is inducement of payment under false pretenses, not negligence in manufacture or design, and the injury sought to be remedied is the direct financial harm represented by that payment, not consequential damages from product defects. Even if it could be said that the mishap here may not have occurred "but for" a multitude of events culminating in the operation of the helicopter with a defective part, the Sixth Circuit's holding that damage to property is compensable *under the FCA* if it would not have occurred "but for" the alleged false claim expands the statutory remedy far beyond its plain language and Congress's underlying intent. This expansive reading also has been consistently rejected by other circuits. See, *e.g.*, *United States* v. *Hibbs*, 568 F.2d 347, 351-52 (3d Cir. 1977) (discussing cases).

2. Congress's actions in passing the 1986 Amendments to the FCA confirm that the plain language of the FCA regarding damages means what *Aerodex* says it means and that the Sixth Circuit, by construing the statute in a way that conflicts with *Aerodex*, has done precisely what Congress refused to do in 1986. Amendments proposed in both the Senate and the House would have modified the FCA to allow for recovery of "consequential" damages. The precise purpose of these amendments, as made clear in the Senate

Report describing its proposed amendment, was to overrule *Aerodex*:

> [The proposal] also amends [the FCA] to permit the Government to recover any consequential damages it suffers from the submission of a false claim. For instance, where a contractor has sold the Government defective bearings for use in military aircraft, the Government could recover not only the cost of the new ball bearings, but the much greater cost of replacing the defective ball bearings. *See United States v. Aerodex Inc.*, 469 F.2d 1003 (5th Cir. 1972).

S. Rep. No. 99-345, at 19 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5284. Advocates of the House version of the amendments also understood that by making "consequential" damages available the government would be able, if the FCA were amended as proposed, to recover replacement costs. See, *e.g.*, 132 Cong. Rec. H6480 (daily ed. Sept. 9, 1986) (remarks of Rep. Brown) (the proposed bill includes "consequential damages" to ensure that "recovery will reflect actual replacement cost in every instance").

In the end, however, these proposed amendments to the FCA were rejected by Congress in the bill as passed. 132 Cong. Rec. H9388 (daily ed. Oct. 7, 1986). The bill's leading proponent in the House, Representative Glickman, explained why: While the previous version of the bill passed by the House had included "double damages, consequential damages and costs," the version that ultimately was enacted into law "provides for treble damages and deletes consequential damages." *Id.* Representative Glickman identified this change as one of two "major differences" between the original House bill and the bill as compromised with the Senate, and noted that these compromises were "necessary in order for this legislation to become law." *Id.* It is clear from this history that, as this Court recently noted in *Cook County*, treble damages were adopted in 1986 as a "substitute" for "consequential" damages. 2003 WL 890268, at *7 n.9.

Moreover, under both the House and the Senate proposals, "consequential" damages were added on only after actual damages had been doubled or trebled, as the case may be.[10] Thus, none of the 1986 proposals before Congress went nearly so far as the government asks the courts to do in this case: *i.e.*, to include "consequential" damages in the baseline damages to be trebled.

3. The Sixth Circuit's decision in this case also deepens existing divisions among the courts as to the proper measure of damages in an FCA case involving substandard products. The court below pays lip service to the FCA measure of damages endorsed by this Court in *Bornstein*,[11] but no other court has extended the *Bornstein* rule as far as the Sixth Circuit in the instant case, which treated the value of the entire remanufactured aircraft as the benefit of a bargain to upgrade specified components of helicopters already owned by the government. The cases do reflect, however, division and uncertainty as to the meaning of the *Bornstein* rule.[12]

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[10] *See* S. 1562, 99th Cong (2d Sess. 1986), as passed by the Senate (providing for "3 times the amount of damages" unless the court finds certain conditions indicating the defendant's cooperation with federal officials, "in which case the court may assess not less than 2 times the amount of damages, in addition to the amount of consequential damages"); H.R. 4827, 99th Cong. (2d Sess. 1986), as reported from the House Comm. on the Judiciary, June 26, 1986 (providing for "an amount equal to consequential damages ... plus 2 times the amount of damages (other than such consequential damages)").

[11] Under *Bornstein*, "[t]he Government's actual damages are equal to the difference between the market value of the [goods] it received and retained and the market value that the [goods] would have had if they had been of the specified quality." 423 U.S. at 316 n.13.

[12] For example, the Federal Circuit in *Daff* v. *United States*, 78 F.3d 1566 (Fed. Cir. 1996), allowed damages under the FCA, without analysis of the *Aerodex* or *Bornstein* issues, for the Government's costs of testing and repair of defective components. In contrast, the Second Circuit, in *United States* v. *General Dynamics Corp.*, 19 F.3d 770, 777 (2d Cir. 1994), stated that "consequential damages" are recoverable "under the FCA and federal common law," but the only damages at issue in that case

While the damages permitted by the Sixth Circuit would typically be considered "consequential" under the Uniform Commercial Code or the common law,[13] the taxonomy of "direct" versus "consequential" damages has engendered considerable confusion. Indeed, as if to capitalize on the confusion, the Department of Justice ("DOJ") has instructed its attorneys that, "in attempting to recover damages which flow from the false claim, they should *not* be labeled 'consequential damages[,]' .... [but] should be shown to be the 'natural and proximate' result of the defendant's misrepresentations." DOJ, *Civil Division Fraud Monograph* 161 (Nov. 1988). Indeed, this "labeling" tactic worked for the government below; the district court held that "consequential" damages are not recoverable under the FCA, but that the government could nonetheless potentially recover damages, before trebling, up to and including the aircraft's replacement cost. App. 54a, 56a, 63a.

A consistent application of the *Bornstein* measure of FCA damages and the *Aerodex* rule limiting recovery to the amount improperly paid out by the government would contribute considerable certainty in this area. This solution would entail reaffirmation of the measure of damages first articulated by the Ninth Circuit many years ago in a case cited with approval by this Court in *Bornstein*, 423 U.S. at 317 n.13. In *United States* v. *Woodbury*, 359 F.2d 370, 379 (9th Cir. 1966), the court stated: "Ordinarily the measure of the

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were actual overcharges to the government resulting from a kickback. The recovery of an actual overcharge in an FCA case cannot in any sense be considered "consequential" damages.

[13] *See, e.g.*, 1 J. White & R. Summers, *Uniform Commercial Code* § 10-4, at 567 n.10 (4th ed. 1995) ("Whenever a defective component part causes an accident that damages the entire product, a large part of the total damage may be consequential."); U.C.C. § 2-715(2)(b) ("Consequential damages resulting from the seller's breach include ... injury to person or property proximately resulting from any breach of warranty."); *id.* cmt. 5 (consequential damages include those flowing from "the use of goods without discovery of the defect causing the damage").

government's damages would be the amount that it paid out by reason of the false statements over and above what it would have paid if the claims had been truthful." This measure of damages is consistent with *Bornstein*, consistent with *Aerodex* and the Congress's refusal to overrule it, and consistent with the plain language of the FCA.[14]

4. The consequences of the Sixth Circuit's decision, if unreviewed, on the government contracting community would be breathtaking. In this case, a supplier that submitted a claim for $4 million to the government for retrofitting an existing aircraft could be found liable for nearly $40 million in damages, depending on the valuation of the aircraft it had upgraded. Indeed, under the Sixth Circuit's analysis, it would make no difference if the "remanufacturing" contract had been for only $1 million per aircraft or less and the value of the upgraded aircraft (like a B-2 bomber) stretched to more than a billion dollars; the contractor would still be liable for "the value that [the aircraft] would have had if it had been of the specified quality," App. 19a, times three. Nothing in the FCA justifies such a perverse rule, and it is unclear how many companies would continue to be willing to contract, or at what prices, with the government in such circumstances. Review by this Court is therefore essential.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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[14] Not only did the Sixth Circuit state the wrong standard for FCA damages, but its analysis is absurd on its own terms. The market value "as received" of a remanufactured helicopter with a defective gear is not zero, *see* App. 18a, any more than a 2003 Mercedes Benz with a defective transmission part has a market value of zero. Moreover, the market value of what Boeing "promised" was not the market value of the entire aircraft, *id.* at 18a-19a. Boeing contracted to upgrade an existing CH-47 helicopter owned by the government; the independent, pre-existing value of the government's helicopter was no part of what Boeing bargained to provide.

Respectfully submitted,

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March 21, 2003

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 00-4157

UNITED STATES OF AMERICA ex rel. BRETT ROBY,
Plaintiff-Appellee,

v.

BOEING CO.,
Defendant-Appellant.

Argued: Jan. 25, 2002
Decided and Filed: Sept. 12, 2002

Before MERRITT, BOGGS, and MOORE, Circuit Judges.

MOORE, J., delivered the opinion of the court, in which MERRITT, J., joined. BOGGS, J. (pp. 649-52), delivered a separate dissenting opinion.

OPINION

MOORE, Circuit Judge.

This action was brought under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, to recover damages for the loss of a helicopter that Defendant-Appellant Boeing Co. ("Boeing") had remanufactured or overhauled for military use. Boeing now raises the questions of law certified for interlocutory appeal by the district court, arguing that the district court erred in holding (1) that the High-Value Items Clause ("HVIC"), set forth in 48 C.F.R. ("FAR") § 52.246-24, and incorporated into the helicopter contract between the United States ("Government") and Boeing, does not operate

as a defense to damages sought under the FCA and (2) that the Government may recover damages for the loss of the helicopter. We AFFIRM the judgment of the district court.

I. BACKGROUND

In 1985 and 1989, the United States Army ("Army") awarded multiyear procurement contracts totaling approximately $2 billion to Boeing for the remanufacture of almost four hundred Boeing-manufactured CH-47A/B/C Chinook helicopters to the CH-47D configuration. As part of these contracts, Boeing was required to inspect and to ensure the quality of all of the parts used for the remanufacture, including those items purchased from its chosen subcontractors. The contracts provided warranty coverage for the helicopters from all defects in material and workmanship for the lesser of two-hundred flight hours or twenty-four months after acceptance.

On August 28, 1990, the Army accepted delivery of a remanufactured CH-47D helicopter ("Aircraft 89-0165"). The next day, Boeing submitted a claim for payment to the Government, in the form of a $4.1 million invoice for Aircraft 89-0165. On January 11, 1991, after fifty-six flight hours, Aircraft 89-0165 suffered the failure of a defective flight-critical transmission gear [1] and crashed during a low-level contour flight over the Saudi Arabian desert as part of Operation Desert Shield. Aircraft 89-0165 and its contents were totally destroyed at a loss of at least $10 million. The Army replaced Aircraft 89-0165 with a new CH-47D helicopter that cost almost $13 million.

On May 22, 1995, Relator Brett Roby ("Roby") filed a *qui tam* action under seal pursuant to 31 U.S.C. § 3730(b) on behalf of himself and the Government, alleging that Boeing

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[1] A "flight critical part" is necessary for flight; its failure could cause the loss of the aircraft. J.A. at 1451 (Gray Dep.).

and its supplier, Speco Corp. ("Speco"), had violated the FCA by making false statements about the manufacture and sale of defective transmission gears to the Army via Boeing's remanufactured CH-47D helicopters. Speco manufactured the gears that Boeing installed into the CH-47D helicopters before their delivery to the Army. On April 30, 1997, the Government intervened and filed an Amended Complaint against Boeing, which was unsealed on May 1, 1997.

In its Answer, Boeing denied the allegations of FCA violations and raised a total of twelve affirmative defenses. Specifically, Boeing claimed: (1) that the HVIC, included by regulation in the helicopter contract, barred the damages sought under the FCA and (2) that consequential damages were not available under the FCA.

On December 21, 1998, the Government filed a motion for partial summary judgment, challenging Boeing's assertion of the HVIC as an affirmative defense. After hearing oral argument, the district court granted the motion. *United States ex rel. Roby v. Boeing Co.*, 73 F.Supp.2d 897, 912 (S.D.Ohio 1999) ("*Roby I*"). On February 5, 1999, Boeing filed a cross-motion for partial summary judgment as to the measure of damages. After hearing oral argument, the district court granted Boeing's motion in part, with respect to the general issue of consequential damages, but denied the motion as it related to the Government's damages in this case. *United States ex rel. Roby v. Boeing Co.*, 79 F.Supp.2d 877, 895-96 (S.D.Ohio 1999) ("*Roby II*").

On August 3, 2000, before trial, the parties reached a settlement under which Boeing made an immediate payment of $25 million. The settlement did not include the FCA claim arising from the Saudi crash; an additional payment of $15 million is contingent upon the outcome of this appeal. The

district court accepted the settlement and certified for interlocutory appeal the following questions of law:

1. Whether the [Government] can recover damages under the [FCA] for loss of a helicopter resulting from the failure of a defective flight-critical component part; and

2. Whether the [HVIC] contained in [FAR] § 52.246-24 and incorporated in the Boeing CH-47D helicopter contract operates as a defense to damages sought under the [FCA] for the loss of or damage to a helicopter resulting from the failure of a defective component part.

J.A. at 214 (Order to Amend and Certify). On September 18, 2000, we granted Boeing's petition for permission to appeal. We have no question before us concerning whether and to what extent Boeing's conduct was fraudulent. Rather, the question is whether the HVIC precludes liability under the FCA, assuming that liability would otherwise exist.

II. ANALYSIS

In an interlocutory appeal, we review a district court's legal conclusions de novo. *Northwestern Ohio Adm'rs, Inc. v. Walcher & Fox, Inc.*, 270 F.3d 1018, 1023 (6th Cir.2001).

A. Mootness

We first consider sua sponte the jurisdictional question whether the parties' settlement of August 3, 2000, renders this case moot. Under Article III of the Constitution, our exercise of judicial power is limited to "actual cases or controversies." *Affholder, Inc. v. Preston Carroll Co.*, 866 F.2d 881, 885 (6th Cir.1989) (quoting *Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984)) (internal quotation marks omitted). "Settlement of a claim before a final adjudication moots the claim and deprives the federal judiciary of jurisdiction over the claim." *Id.* Agreements to limit recoverable damages, however, do not moot cases and therefore do not affect our jurisdiction. *Id.*

The parties' settlement in this case is essentially the same as the agreement to liquidate damages that was reached in *Nixon v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982), where a discharged air force employee sought civil damages from the former president. *Id.* at 733, 102 S.Ct. 2690. Under the terms of the agreement, the employee accepted $142,000, with an additional amount of $28,000 contingent upon the Supreme Court's ruling that the former president was not entitled to absolute immunity. *Id.* at 744, 102 S.Ct. 2690. Observing that "[t]he limited agreement between the parties left both petitioner and respondent with a considerable financial stake in the resolution of the question presented in this Court," the Court concluded, "Given respondents' continued active pursuit of monetary relief, this case remains definite and concrete, touching the legal relations of parties having adverse legal interests." *Id.* (quotation omitted).

In this case, Boeing has already paid the Government $25 million; it has agreed to pay an additional amount of $15 million contingent upon our rulings with respect to the scope of the FCA and the HVIC. Therefore, because the parties have "a considerable financial stake," the case is not moot, and we will proceed to the merits of this appeal.

B. The FCA and the HVIC

The history of the FCA dates back to 1863, when it was enacted "with the principal goal of stopping the massive frauds perpetrated by large [private] contractors during the Civil War." *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 781, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000) (quotation omitted). The FCA has since become the primary means by which the Government combats and deters fraud. H.R.Rep. No. 99-660, at 18 (1986). As amended in 1986, the FCA provides for a civil penalty from $5,000 to $10,000 and treble damages when an individual knowingly acts to defraud the Government and does not "fully

cooperate[ ] with any Government investigation of such violation." 31 U.S.C. § 3729(a). The Supreme Court understands the current version of FCA damages to be "essentially punitive in nature." *Vt. Agency*, 529 U.S. at 784, 120 S.Ct. 1858 (explaining that the Court had "suggested that damages under an earlier version of the FCA were remedial rather than punitive [because] that version of the statute imposed only double damages and a civil penalty of $2,000 per claim" (citations omitted)).

Whereas the FCA allows the Government to recoup losses from fraud, the HVIC helps to manage the costs of liability insurance. Since 1984, the Federal Acquisition Regulations ("FAR") have prescribed the insertion of the HVIC in certain government contracts to limit the liability of contractors "for loss of or damage to property of the Government (including the supplies delivered under th[e] contract) that (1) occurs after Government acceptance of the supplies delivered under th[e] contract and (2) results from any defects or deficiencies in the supplies." FAR § 52.246-24(a).[2] The HVIC covers the loss of or damage to a high-value item, defined as "a contract end item that (a) has a high unit cost (normally exceeding $100,000 per unit) . . . and (b) is designated by the contracting officer as a high-value item." *Id.* § 46.802. Regarding such high-value items, the Government's stated policy is to "act as a self-insurer" and to "relieve contractors of contractual liability for loss of or damage to those items." *Id.* § 46.803. In short, the HVIC represents the Government's assumption of the risk that a high-value item such as Aircraft 89-0165 may be lost or damaged after acceptance as a result

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[2] From 1971 to 1984, when the FAR became effective, Armed Services Procurement Regulation ("ASPR") 7-104.45 relieved contractors of such liability. *See* J.A. at 437 (Defense Procurement Circular 86 ("DPC 86") at 4), 485-86.

of a defect or deficiency in the item. It does not necessarily imply that the Government has self-insured for the damages that result from violations of federal law.

Boeing itself accepts the fact that, "[a]ssuming the government could prove a false claim, a contractor would remain liable for penalties and, if there be any, other appropriate FCA damages, notwithstanding the HVIC." Appellant's Br. at 31. However, relying on the text and history of the HVIC, Boeing argues that the HVIC prohibits the recovery of damages under any and all causes of action, when those damages result from the fraud of non-managerial personnel, meaning that there would be no appropriate FCA damages in this case. The issue before us is whether the HVIC's limitation of contractor liability extends to cases brought under the FCA. Specifically, we must decide whether the Government has agreed to limit damages that would otherwise be recoverable under the FCA.

In holding that the HVIC provides no defense to claims of FCA violations, the district court first noted that the FAR limit the application of the HVIC "to contractual remedies and not to claims premised under the [FCA]"; indeed, the HVIC and the FCA are silent with respect to each other. *Roby I*, 73 F.Supp.2d at 910. Therefore, the district court declined to find them inconsistent. *Id.* Because FCA claims arise from the submission of a false or fraudulent claim, the district court concluded that the HVIC's limitation on contractual liability did not limit a contractor's liability under the FCA, finding no evidence in the record of any such intent on the Government's part. *Id.* at 910-11. Finally, the district court distinguished *United States v. United States Cartridge Co.*, 198 F.2d 456 (8th Cir.1952), *cert. denied*, 345 U.S. 910, 73 S.Ct. 645, 97 L.Ed. 1345 (1953), which held that a liability-limiting contract provision did limit the Government's

FCA claims, *id.* at 465, on the ground that the contract was made in the emergency situation preceding World War II, making the case unique. *Roby I*, 73 F.Supp.2d at 911-12.

We agree with the district court that the HVIC does not bar the Government from suing Boeing under the FCA to recover damages for Aircraft 89-0165. We look first to the language of the FCA, which holds a defendant liable for a civil penalty "plus 3 times the amount of damages which the Government sustains because of the act of that person." 31 U.S.C. § 3729(a). The allegedly fraudulent act in this case is Boeing's "false[ ] represent[ation] that the helicopters conformed to contract requirements and fail[ure] to disclose their faulty manufacture to the United States Government." J.A. at 87 (Am. Compl. at ¶ 3).[3] Because of this false claim, the Government sustained the loss of Aircraft 89-0165. Therefore, the Government argues that Boeing is liable under the FCA for treble damages as well as a civil penalty.

At this point, Boeing would direct us to the HVIC, which limits contractor liability for high-value items in fairly broad terms:

> Except as provided in paragraphs (b) through (e) below, and notwithstanding any other provision of this contract, the Contractor shall not be liable for loss of or damage to property of the Government (including the supplies delivered under this contract) that (1) occurs after Government acceptance of the supplies delivered under this contract and (2) results from any defects or deficiencies in the supplies.

FAR § 52.246-24(a). The HVIC does not reference the FCA, but it does expressly refuse to limit a contractor's liability

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[3] We note that Boeing "vigorously denies" any knowing submission of a false claim in this case. Reply Br. at 4. However, we must assume such a submission to address whether the HVIC precludes FCA damages when incorporated as a contract provision.

when "the Government's acceptance of [a high-value item] results from willful misconduct or lack of good faith on the part of any of the Contractor's managerial personnel." FAR § 52.246-24(b).[4] The parties have stipulated that this exception is not at issue in this case. Therefore, according to Boeing, the HVIC's limitation of liability for loss or damage is absolute, precluding the Government from recovering any damages (as opposed to a civil penalty) under the FCA.

We cannot dispose of the FCA claim so easily. Although the loss of Aircraft 89-0165 occurred after Government acceptance and resulted from the defective Speco gear, it was actually caused by Boeing's initial misrepresentation that the

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[4] This exception originally included "fraud or gross negligence as amounts to fraud[ ] on the part of any personnel of the Contractor." J.A. at 437 (ASPR 7-104.45(b)(ii) (1971)). The defense industry objected to this provision on the following grounds:

> Today's exposure to possible infiltration by any number of dissident factions in our society serves to highlight the impossibility of any management to reasonably accept as an uninsured risk the results of any individual's actions regardless of the extreme nature of such acts.
>
> Therefore, the introduction of this exception goes a long way toward negating the main purpose of DPC 86; that is, to remove from the Contractor the risk of potential liability for damage to Government property and eliminate from Government procurement the cost of Contractors' liability insurance against such liability for damage to Government property.
>
> Unless the insurance exception is substantially modified and the exception regarding fraud of any personnel is removed, there is serious question whether DPC 86 implementation will have any real effect upon the cost of Contractor insurance included in the overall cost of the Government procurement program.

J.A. at 464-65 (Letter from Council of Defense and Space Industry Associations, to Captain E.C. Chapman, Chairman, ASPR Committee 4-5 (Aug. 12, 1971)). The Department of Defense eventually accepted the recommendation to delete the provision.

helicopter conformed to contract requirements.[5] *This misrepresentation*, which triggered FCA liability, is the key to this case. Boeing argues from the "willful misconduct or lack of good faith" language in the managerial personnel provision, FAR § 52.246-24(b), that damages for FCA violations must be covered by the general limitation of liability. We do not agree. Were the HVIC a typical insurance policy, we would consider resolving the ambiguity in Boeing's favor. *Cf. North Bank v. Cincinnati Ins. Cos.*, 125 F.3d 983, 986-87 (6th Cir.1997) (stating that Michigan law requires courts to construe ambiguous provisions and exclusionary clauses in insurance policies against the insurer). The aim of the HVIC, however, is to "reduc[e] Government procurement costs by limiting the contractor's risk." J.A. at 434 (DPC 86 at 1). The HVIC insures contractors only indirectly; it is, by its own terms, a self-insurance policy, which means that the Government is both insurer and insured. Because nothing in the HVIC suggests that its limitation of contractor liability covers statutory violations, we hold that the district court did not err in concluding that the HVIC does not provide a defense to damages sought under the FCA.

On one level, the dispute in this case is essentially the same as the one in *United States Cartridge Co.*, where the defendant operated a Government-owned ammunition plant during World War II. *United States Cartridge Co.*, 198 F.2d at 458. The Government alleged that the defendant had presented claims for payment that were false because it "fail[ed] to maintain a proper system of inspection and to produce the quality of ammunition called for by the contract." *Id.* In its answer, the defendant denied any wrongdoing and

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[5] In other words, the loss would not have occurred as it did if Boeing had not warranted conformance, because the Government would have required the correction, repair, or replacement of the gear, which was under warranty. The HVIC itself emphasizes this obligation. FAR § 52.246-24(d)(1).

argued that its liability was limited by contractual terms similar to the HVIC. *Id.* at 459-60. After a bench trial, the district court dismissed the case, noting that the limitation of liability was stated in "broad terms" and did not violate public policy. *Id.* at 460-63. The Eighth Circuit affirmed the dismissal. *Id.* at 465.

Not surprisingly, the parties disagree as to whether and how the *United States Cartridge Co.* decision should affect our disposition of this case. We think that the district court correctly distinguished the two cases. *See Roby I*, 73 F.Supp.2d at 911-12 (emphasizing "the emergency situation" of war in *United States Cartridge Co.* and contrasting the "extensive governmental control of a prime contractor" in that case with the "limited governmental monitoring" in the case at bar). Moreover, we believe that the Government's public policy argument in this case is stronger than it was in *United States Cartridge Co.*, where the Eighth Circuit concluded:

> If this contract were to be regarded as one creating the conventional relationship between the Government and a commercial corporate contractor not subject to Government supervision and control, for the supplying of goods or services, and if the provisions limiting liability were to be viewed merely as an attempt to relieve such a contractor from liability for its own fraud, the Government's argument [that the limitation of liability was void] might perhaps be unanswerable.
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> But this was not a conventional Government contract made under normal conditions; it was an unusual arrangement made to meet a crisis. . . . "The industrial units thus created are unique. * * * These plants embody a new and tripartite relationship among Government, labor, and management."

United States Cartridge Co., 198 F.2d at 464-65 (internal citation omitted). The contract in this case was a conven-

tional one for the remanufacture of helicopters almost entirely during peacetime, and Boeing was not subject to Government supervision or control. These differences suggest that the limitation of liability in *United States Cartridge Co.* allocated risks in a way much more favorable to the defendant than does the HVIC. In short, we do not read the HVIC as an agreement by the Government to assume the risk of damages to high-value items that it sustains because of FCA violations.

Boeing implores us to hold the Government to its contractual responsibilities and points us to the Fourth Circuit's recent decision in *United States v. Bankers Insurance Co.*, 245 F.3d 315 (4th Cir.2001), where the question on appeal was "whether the existence of an FCA claim precludes arbitration of a contract dispute involving the Government." *Id.* at 318. The contract dispute concerned a federal agency and a private insurance company that had agreed to arbitrate any misunderstandings or disputes. *Id.* at 317-18. The Government contended that the Attorney General was not bound by the arbitration agreement because (1) he had not been a party to the agreement, *id.* at 319, and (2) arbitration would impair his exclusive authority to enforce the FCA. *Id.* at 324. Unpersuaded by these arguments, the Fourth Circuit ultimately required the Government to submit to nonbinding arbitration before litigating the FCA claim. *Id.* at 324-25.

According to Boeing, the holding in *Bankers Insurance* that the Government must satisfy its contractual obligations supports the proposition in this case that the Government may comply with the HVIC only by refraining from seeking damages under the FCA. That the Government is bound by the contracts that its authorized officials sign is incontrovertible. However, we cannot as readily agree with the inference that Boeing draws from *Bankers Insurance* for the resolution of this case. The Fourth Circuit recognized that FCA claims are "premised on a unique statutory right" and explicitly noted that "the statutory authority of the Attorney

General [to enforce the FCA would] not [be] compromised by" making the Government honor its previous agreement to arbitrate. *Bankers Ins.*, 245 F.3d at 325. In other words, the contract in *Bankers Insurance* merely deferred the litigation of the FCA claim until the nonbinding arbitration process had been completed.

In this case, however, Boeing's interpretation of the HVIC would absolutely foreclose the Government from recouping anything more than a $10,000 civil penalty for damages sustained because of a false claim for a high-value item, when the damages sustained could be far greater than the general $100,000 threshold for such items. Given Congress's explicit recognition while amending the FCA "that a large number of fraud cases and many of the larger-dollar cases arise out of Department of Defense contracts," H.R.Rep. No. 99-660, at 20,[6] it strikes us as incongruous that the HVIC would relieve contractors for high-value items from the FCA's damages provision. After all, the motivating purpose of the FCA is to combat and to deter fraud, which would not be served in the context of defense contracts by the civil penalty alone.

In its brief, Boeing expounds at length on the negative implications, both fiscal and otherwise, of holding military contractors liable under the FCA for damages to high-value items. We agree with the Government and Roby that we should leave any revision of the FCA or the HVIC to Congress. In the case before us, Boeing was contractually

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[6] *See also* S.REP. No. 99-345, at 2-3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267 ("In 1985, the Department of Defense Inspector General, Joseph Sherick, testified that 45 of the 100 largest defense contractors, including 9 of the top 10, were under investigation for multiple fraud offenses. Additionally, the Justice Department has reported that in the last year, four of the largest defense contractors, General Electric, GTE, Rockwell and Gould, have been convicted of criminal offenses while another, General Dynamics, has been indicted and awaits trial." (citations omitted)).

required to ensure the quality of the parts used for the remanufacture of the Army's helicopters; its failure to do so resulted in the Government's acceptance and use of a helicopter that was not flight-ready and the subsequent loss of the helicopter. The HVIC does not foreclose the FCA as a means for the Government to recover damages for the loss of Aircraft 89-0165.

C. FCA Damages

The crux of this case is the appropriate measure of damages under the FCA, which simply provides for "3 times the amount of damages which the Government sustains because of the act of th[e] person" who submitted the false or fraudulent claim. 31 U.S.C. § 3729(a). We have previously observed that FCA damages "typically are liberally calculated to ensure that they 'afford the government complete indemnity for the injuries done it.'" *United States ex rel. Compton v. Midwest Specialties, Inc.*, 142 F.3d 296, 304 (6th Cir.1998) (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549, 63 S.Ct. 379, 87 L.Ed. 443 (1943)). "[T]he government is entitled to full damages where it proves it received no value at all." *Id.*

In *Marcus*, the Supreme Court indicated that "restitution to the government of money taken from it by fraud" was the motivating purpose of the FCA; therefore, "the device of [then-] double damages plus a specific sum was chosen to make sure that the government would be made completely whole." *Marcus*, 317 U.S. at 551-52, 63 S.Ct. 379. Three decades later, in *United States v. Bornstein*, 423 U.S. 303, 96 S.Ct. 523, 46 L.Ed.2d 514 (1976), the Supreme Court understood the baseline to be "the Government's actual damages," measured as "equal to the difference between the market value of the [goods] it received and retained and the market value that the [goods] would have had if they had been of the specified quality." *Id.* at 316 & n. 13., 96 S.Ct. 523 The Bornstein Court favored this formula because it

"maximizes the deterrent impact of the [then-] double-damages provision and fixes the relative rights and liabilities of the respective parties with maximum precision." *Id.* at 317, 96 S.Ct. 523.

In this case, the district court held that the Government could recover damages under the FCA that were "the direct, proximate, and foreseeable result of the claims submitted by" Boeing for Aircraft 89-0165; Boeing had argued that its liability at most was limited to "the price of a fully-conforming transmission gear." *Roby II*, 79 F.Supp.2d at 895. On appeal, Boeing continues to maintain that "the proper measure of direct FCA damages is the amount wrongfully paid on the claim," Reply Br. at 23, or the value of the defective Speco gear. However, Boeing now concedes that damages under the FCA could equal—but never exceed—the amount of the claim, which in this case would be the approximately $4.1 million value of Boeing's contract to remanufacture Aircraft 89-0165.

Negotiation strategy aside, we are at a complete loss as to how Boeing can understand "the amount wrongfully paid" to be limited to "the portion of the contract price allocated to the defective gear." Reply Br. at 21. According to our reading of the contract and the subsequent invoice, Boeing billed the Government for the remanufactured helicopters as units, not as assemblages of assorted parts. *Cf. Bornstein*, 423 U.S. at 307, 96 S.Ct. 523 (invoices for radio kits that contained falsely marked electron tubes "included claims for payment for the falsely marked tubes"). The fact that every component but one conformed to contract requirements is not legally significant when the defective gear was "flight critical" and thus necessary for flight. Because the Speco gear was defective, Aircraft 89-0165 was defective, making Boeing's entire claim for payment false for the purposes of the FCA.

This understanding of Boeing's FCA violation informs our analysis of how to calculate damages under the FCA. Under the "diminished value" or "benefit of the bargain" test, which Boeing cites as controlling, we subtract the market value of what the Government received from what it was promised.[7]

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[7] *See generally* JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 3.01[D][1], at 3-34 to 3-35 (2d ed. Supp.2002). The facts of *Bornstein*, where the Supreme Court articulated this rule, are similar to those of this case and deserve some attention. *Bornstein* involved a Government contract for radio kits, which were to contain electron tubes of a certain quality. *Bornstein*, 423 U.S. at 307, 96 S.Ct. 523. The subcontractor who supplied these tubes sent tubes that were falsely marked as meeting the Government's specifications. *Id.* The contractor then incorporated the falsely marked tubes into the radio kits and shipped them to the Government. *Id.* The contractor's invoices were thus false because they "included claims for payment for the falsely marked tubes that had been supplied" by the subcontractor. *Id.* After recovering damages for the tubes from the contractor, presumably by settlement, the Government brought an FCA action against the subcontractor. *Id.* at 307-08, 96 S.Ct. 523. In holding "that the Government's damages should be doubled [as the FCA then provided] before any compensatory payments are deducted," *id.* at 314, 96 S.Ct. 523, the *Bornstein* Court stated that those damages were "equal to the difference between the market value of the tubes it received and retained and the market value that the tubes would have had if they had been of the specified quality." *Id.* at 317 n. 13, 96 S.Ct. 523.

We recount these facts in detail because the similarity between *Bornstein* and this case might prompt the all-too-easy substitution of "gear" for "tubes" in the equation quoted above. In both cases, the claim for payment was false because of a defective part that a subcontractor had supplied. However, as the district court correctly noted, "*Bornstein* was concerned only with the issue of damages and penalties against a subcontractor who causes the prime contractor to submit false claims." *Roby II*, 79 F.Supp.2d at 893 n. 47. The defendant in this FCA action, of course, is Boeing, not Speco. We cannot know why the Government settled with the contractor in *Bornstein* for only the cost of the falsely marked tubes when it had contracted and paid for radio kits—perhaps the tubes did not affect the reliability of the radios. *See Bornstein*, 423 U.S. at 318-20, 96 S.Ct. 523 (Rehnquist, J., concurring in part and dissenting in part) (describing the subcontractor's scheme). In this case, however, the

That the contract in this case was for the remanufacture rather than the sale of a helicopter gives us some pause, but ultimately does not affect the issue before us.[8] We will therefore frame the following discussion in terms of the market value of remanufactured helicopters.

Under *Compton*, the market value of Aircraft 89-0165 as delivered was zero. Boeing, of course, would disagree, and we are aware of the fact that the Army did get fifty-six hours of flight time from the helicopter, when the warranty was good for two-hundred flight hours. However, as we concluded in *Compton*:

> [A] setoff based on value purportedly received would create a perverse incentive system in which government contractors could endanger the lives of American soldiers by providing substandard materiel, and the Army would be deterred from correcting the danger because it would be forced to bear the cost of any use it received from the substandard goods before their defects were discovered.

Compton, 142 F.3d at 305 n. 8. We believe that this policy argument, which was compelling with respect to untested jeep brake-shoe kits, *id.* at 297-98, has even more force in the context of this case.

Compton is not as helpful in determining the market value of Aircraft 89-0165 as promised. In *Compton*, we held that the Government could recover the contract price because

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Speco gear was not simply of lesser quality than specified; it was a defective flight-critical part, which made the loss of Aircraft 89-0165 inevitable.

[8] Again, we note that the question certified for appeal is "[w]hether the [Government] can recover damages under the [FCA] for loss of a helicopter resulting from the failure of a defective flight-critical component part." J.A. at 214. The answer to this question does not depend on whether the underlying contract was for remanufacture or sale.

damages were the same whether we applied the diminished-value test, as the defendant urged, or the Uniform Commercial Code's rejection provision. *Id.* at 305. However, contrary to Boeing's reading of the case, *Compton* does not necessarily signify that the recovery of damages in FCA cases is "limited to the contract price originally paid." Reply Br. at 26. Although the Government apparently did not claim that its full or actual damages were more than the contract price in *Compton*, it does so in this case.

Boeing characterizes the Government's claim as one for replacement costs, which it argues are consequential damages and thus unrecoverable under the FCA. We think that this characterization confuses the issue. Under the diminished-value test that Boeing itself favors, actual damages depend on "market value." *Bornstein*, 423 U.S. at 317 n. 13, 96 S.Ct. 523. Boeing conflates market value and contract price, but the concepts are clearly distinct. *Cf.* U.C.C. § 2-713 (2001) ("[T]he measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price . . ."). In this case, the Government contracted for Aircraft 89-0165 to be remanufactured to specific standards. The helicopter as received by the Government did not meet those specifications. Therefore, the Government's damages equal the difference between the market value of Aircraft 89-0165 as received (zero) and as promised. We do not presume to estimate the market value of a remanufactured helicopter. For our present purposes, we answer the question certified for interlocutory appeal in the affirmative—that is, the Government may recover damages under the FCA for the loss of a helicopter that results from the failure of a defective flight-critical component part. We note that these damages do not represent replacement costs.[9] Because the Government did

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[9] The Federal Circuit has observed that the diminished-value test is "the normal measure of damages" in FCA cases but held that "[i]n the

not contract for a new helicopter, it may not recover the roughly $13 million value of the helicopter bought to replace the destroyed Aircraft 89-0165. However, it may recover the benefit of its bargain with Boeing, which would be the value that Aircraft 89-0165 would have had if it had been of the specified quality.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.

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unusual case in which actual loss in value cannot be ascertained, the injured party may recover the replacement cost, but only if that cost is not clearly disproportionate to the probable loss in value caused by the defects in question." *Commercial Contractors, Inc. v. United States*, 154 F.3d 1357, 1372-73 (Fed.Cir.1998). "The cost of remedying defects is not regarded as disproportionate if the defects significantly affect the integrity of a structure being built. In that setting, the injured party is entitled to recover the cost of remedying the defects despite the fact that the cost may be very high." *Id.* at 1372.

So instructed, we observe that if the actual loss in Aircraft 89-0165's value could not be ascertained, then the Government would be entitled under *Commercial Contractors* to recover the very high cost of replacing the downed helicopter, because the defect concerned a flight-critical gear and significantly affected the structural integrity of the helicopter.

BOGGS, Circuit Judge, dissenting.

I respectfully dissent from the court's restrictive reading of the HVIC and its resultant holding that the Government can sue Boeing under the FCA to recover damages for Aircraft 89-0165.

As the court admits, the HVIC "limits contractor liability for high-value items in *fairly broad terms*." Majority Op. at 643 (emphasis added). The plain language of the HVIC states that, with limited exceptions that the parties agree are not applicable to the present case, "the Contractor shall not be liable for loss of or damage to property of the Government . . . that (1) occurs after Government acceptance of the supplies delivered under this contract and (2) results from any defects or deficiencies in the supplies." 48 C.F.R. § 52.246-24. Put most simply, this case is about the Government trying to do exactly what the plain and obvious wording of its contractual term says it will not do: recover from "the Contractor" for the "loss of or damage to property of the Government."

The court's holding—that the Government can seek under the FCA exactly what it has contracted through the HVIC not to—flows in large part from the inherent tension the court sees between the FCA and the HVIC. The court states well the history and purpose of each—the FCA was adopted to combat fraud perpetrated on the Government by its contractors, and the HVIC is included as a self-insurance provision in certain Government procurement contracts to limit the insurance that contractors must acquire (and the resultant costs those contractors pass on to the Government). Majority Op. at 641-42. The court then explains that if the HVIC is given a natural reading, it will conflict with the goals of the FCA. Majority Op. at 645.[1]

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[1] I note that the court mentions in passing the district court's reading of the HVIC, which would alleviate any perceived tension between the

However, the court unnecessarily complicates the case. Contrary to the court's reading, the FCA and HVIC can easily be read in harmony. The HVIC does not overwrite or preempt the FCA by relieving contractors of liability for fraud. The FCA is still applicable to the contractors; the only difference made by the HVIC is that the Government has agreed that it will not hold the contractors liable under any theory for the value of the helicopter. Accordingly, the Government can sue the contractors under the FCA and seek a finding of liability for fraud; the Government merely can not seek damages for the value of the equipment. The other penalties under the FCA are still applicable, and if the Government feels that it has been defrauded, it may debar

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HVIC and the FCA by limiting the HVIC's effect to only *contractual* remedies; in this reading, the HVIC would be completely inapplicable to the Government's *statutory* remedy under the FCA. Majority Op. at 642 (citing *Roby I*, 73 F.Supp.2d at 910). To the extent that the court relies on this distinction, it appears incorrect. First, while the word *contractual* is used to modify the remedies limited by the HVIC in its enabling regulation, that modifier does not appear in the form contract language set out in the regulations, 48 C.F.R. § 52.246-24, or in the parties' contract (which incorporated the form language). Therefore, the clause as it appears in the parties' contract facially covers *all* remedies. Second, the word *contractual* as used in the enabling regulation for the HVIC is open to interpretation. In addition to the definition the district court gave it, that its protection only applies to contract remedies the Government might have against Boeing, the use of the word *contractual* might merely be shorthand for any remedies that come out of the relationship embodied in the contract. Indeed this broader reading is more in line with the history of the HVIC. For example, in the case that prompted the Government to turn its unwritten practice of self-insurance into a formal rule, *Australia v. Lockheed Aircraft Corp. & Menasco Mfg. Co.*, No. 69-1623-WPG (C.D.Cal. Jan. 10, 1972), the practice was discussed as a defense to contract, products liability, and negligence claims. Obviously neither negligence nor products liability claims are contract remedies in the narrow sense; they do not arise from a contract, just as a fraud claim does not. However, they can all arise out of a relationship between the parties that is based in a contract.

Boeing from Government contracts. In short, the better reading of the HVIC is as an assumption of risk clause; the Government has contractually agreed to assume the risk of the loss of the helicopter, and while legal means remain open to the Government against Boeing (including that pursuant to the FCA), the Government can not seek recompense for the value of the equipment.[2]

There is support in both the wording and purpose of the HVIC for enforcing a natural reading of the contractual clause—that the Government has contracted away its right to seek property damages from suppliers of high-value items.

First, the wording of the HVIC supports the proposition that it was intended in the usual case to protect contractors from Government actions utilizing a fraud theory. Pursuant to it, contractors are not liable for any damages for the loss of a high-value item caused by a product defect, unless one of the few listed exceptions applies. As the court points out, one of those exceptions is for "willful misconduct or lack of good faith" on the part of managerial personnel. Majority Op. at 643 (citing FAR § 52.246-24(b)). Though not using the word "fraud," willful misconduct and a lack of good faith fairly

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[2] Contrary to the court's contention, the argument that the Government can contract away part of its rights under the FCA is supported by the recent Fourth Circuit decision in *United States v. Bankers Insurance Co.*, 245 F.3d 315 (4th Cir.2001). In that case, the Government was held to an arbitration agreement contained in a contract it had signed when the Government sought instead to bring an FCA action in court against the other party to the contract. The court tries to distinguish *Bankers Insurance* by noting that the contract at issue in that case permitted the Government the unfettered right to sue under the FCA after it engaged in the required arbitration. Majority Op. at 645. Nevertheless, the reasoning of *Bankers Insurance* still applies to the case at hand: "[T]he Government has no special right to ignore its contract responsibilities. The Government should comply with its contract obligations, and it cannot avoid them merely by invoking a statutory civil claim, such as one contemplated under the FCA." *Bankers Insurance*, 245 F.3d at 324.

describe fraud. Therefore, the HVIC expressly exempts from protection losses due to fraud on the part of managerial personnel. The negative pregnant, therefore, would be that the HVIC does protect contractors from losses due to non-managerial fraud (which the parties have stipulated to be the extent of the fraud, if any, in the present case).

Second, the purpose of the clause supports the proposition that it was intended to provide protection no matter the legal theory. In order to explain why, however, I provide a slightly broader history of the HVIC.

As the district court in this case explained, the clause represents a long-standing Department of Defense (DOD) practice of self-insuring for damage to high-value items. *See Roby I*, 73 F.Supp.2d at 908-09. At first it was just a practice, under which the DOD would not hold manufacturers liable for the loss of this type of equipment, regardless of whether the DOD found any fault, negligence, or breach of warranty to have occurred on the part of the manufacturer. *Id.* at 909. Then, in the 1960s, the landing gear on an airplane purchased by the United States military and resold to the Australian Navy failed, resulting in the destruction of the plane. The Australian government sued the manufacturer, seeking tort, contract, and products liability damages. *Ibid.* Referring to the long-standing practice of the Government self-insuring against the loss of military equipment, a California district court found that the United States Navy could have been estopped from pursuing any claim based on the loss of the aircraft, because the airplane industry was aware of and relied upon this practice. *See Australia v. Lockheed Aircraft Corp. & Menasco Mfg. Co.*, No. 69-1623-WPG (C.D.Cal. Jan. 10, 1972). Specifically, the court found that the self-insurance practice had two central purposes: (1) to encourage manufacturers not to obtain liability insurance, the cost of which would be passed on to the Government; and (2) to encourage the manufacturers to cooperate fully in investigating the cause of equipment failures. *Id.* at 2-3.

As the district court in this case pointed out, around this time, the United States Commission on Government Procurement issued a report stating similarly, that defense contractors had long "[u]nderstood that the general practice of the government in military contracting was to accept the risk for loss or damage. . . ." *Roby I*, 73 F.Supp.2d at 909. Still, the *Menasco* case shook the faith of Government contractors in the protection offered by the unwritten policy. In response, in 1971, the DOD issued *Defense Procurement Circular 86*, which, as the court notes, put in writing this limited liability. Majority Op. at 642 n. 2.

The original 1971 version of the DOD's self-insurance policy stated that the clause did not apply "when the defects or deficiencies in such supplies . . . resulted from fraud or gross negligence as amounts to fraud, on the part of *any personnel of the Contractor*." DPC 86 at 4 (emphasis added). However, as the court notes, defense industry representatives warned that this would defeat the purpose of the clause, and when the clause was reissued in 1974, the phrase had been removed. Majority Op. at 643 n. 4. It was replaced with a more limited exception, which—much like the one in the current HVIC—excluded only "willful misconduct or lack of good faith on the part of any of the Contractor's directors or officers, . . . managers, superintendents, or other equivalent representatives. . . ." ASPR 7-104.45 (July 1, 1974).

Importantly, the Government made this change expressly recognizing its effect. In a memorandum discussing proposed revisions to the HVIC, the Armed Services Procurement Regulations Committee, which promulgated the HVIC, explained that the removal of the original fraud provision would "eliminate contractor's [sic] responsibility for damage to Government Property resulting from defective items and caused by the fraud or gross negligence as amounts to fraud of any personnel of the contractor." J.A. at 652 (January 14, 1972). In 1984, the HVIC regulation relevant to this case

became effective and provides substantially the same protection to military contractors providing high-value items. *See* 48 C.F.R. § 52.246-24.

From its history, it is clear that the DOD's self-insurance policy was intended to preclude liability for the loss of certain Government equipment—even when such loss was the result of non-managerial fraud—so that contractors would not purchase liability insurance, which otherwise would be costly and would be a cost passed on to the Government. The plain language of the HVIC at issue in the present case conforms to that purpose. However, the court's decision today does not; under it, contractors will have to insure against potential FCA liability for treble damages for the loss of high-value items resulting from actions that might be held to be fraudulent on the part of any personnel. Presumably, this cost will be passed on to the Government.

In sum, the court today holds that the HVIC does not apply in a situation wherein its plain terms and historical purpose seem to suggest it does apply—a contractor being held liable to reimburse the Government for the loss of a high-value item. Now, the Government argues that this case is not about recovering the amount lost when the helicopter was destroyed, but is instead about holding Boeing responsible for fraud. However, if the Government were really only concerned about fraud, it could seek the other penalties possible under the FCA or debar Boeing from participation in future Government contracts. Instead, the Government seeks trebled payment for the helicopter.

As explained above, if this court had held the HVIC applicable to Government actions for reimbursement under the FCA, it would not have been overriding or preempting the FCA. It would, instead, merely have been upholding the obvious coverage of a standard assumption of risk clause, under which the Government agreed not to exercise certain rights it would otherwise have in exchange for a benefit.

This court would not have been holding that the FCA can not be relied upon by the Government; it would merely have been saying that the Government, in accordance with the express language and historical purpose of the HVIC, can not seek compensation for the loss of the helicopter under any theory, including under the FCA. Because the court does not so hold, I must respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT,
S.D. OHIO,
WESTERN DIVISION.

No. C-1-95-375.

UNITED STATES OF AMERICA ex rel. BRETT ROBY,
Plaintiff,

v.

THE BOEING COMPANY,
Defendant.

Dec. 30, 1999.

ORDER

SPIEGEL, Senior District Judge.

This matter is before the Court on Defendant's Cross-Motion for Partial Summary Judgment as to the Measure of Damages (doc. 340); Government's Response (doc. 366); Relator's Response and Cross-Motion for Summary Judgment as to the Measure of Damages (doc. 367); Defendant's Reply (doc. 401); Aerospace Industries of America, Inc's Motion in Support of Defendant's Cross-Motion as to the Measure of Damages (doc. 402); Relator's Reply (doc. 432); and Defendant's Motion Requesting the Court to Rule on Defendant's Cross-Motion for Partial Summary Judgment as to the Measure of Damages (doc. 556).

BACKGROUND

On May 22, 1995, Relator Brett Roby (hereinafter, "Relator") filed this action under seal pursuant to Title 31

U.S.C. § 3730(b) on behalf of himself and the United States Government (hereinafter, "the Government" or "the United States") in the United States District Court for the Southern District of Ohio (doc. 2). Relator alleges that The Boeing Company (hereinafter, "Boeing" or "Defendant") and its supplier, The Speco Corporation (hereinafter, "Speco"),[1] violated the False Claims Act, Title 31 U.S.C. § 3729, *et seq.*, by manufacturing and selling defective transmission gears to the United States via Boeing's CH-47(D) Chinook Army helicopters[2] (hereinafter, "CH-47(D) helicopters") (*Id.*). On April 30, 1997, the Government intervened and filed an Amended Complaint against Boeing (doc. 34). In the Amended Complaint, the Government alleges that Speco manufactured defective, transmission gears at its Springfield, Ohio facility before Boeing installed the gears in the CH-47(D) helicopters, and, thereafter, supplied the gears to the United States Army (*Id.*). The Amended Complaint was unsealed on May 1, 1997.

Government and Relator allege in Count I of the Amended Complaint that Defendant submitted false claims under Title 31 U.S.C. § 3729-3133, as amended by Pub.L. 99-562, 100 Stat. 3153 (1986) (doc. 34). Specifically, the Government contends that in 1991, one of the Speco-made gears failed in flight, while in service in Saudi Arabia, leading to the total loss of a CH- 47(D) helicopter and all of its contents, at an

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[1] Although Speco was initially a party to this action, as the original maker and supplier of the gears in question to Boeing, Speco filed for bankruptcy during the course of the present litigation. The trustee appointed by the United States Bankruptcy Court subsequently settled this action with the Government and Relator, with the approval of the bankruptcy court on behalf of Speco and its creditors.

[2] The CH-47(D) Chinook helicopter is the Army's medium, tactical, heavy-lift, and transport helicopter, and is normally operated and crewed by a total of four soldiers (doc. 34).

estimated loss of approximately $10 Million (*Id.*).[3] In addition, the Government alleges that in 1993 another Speco-made gear failed in another helicopter incident resulting in a hard landing near Ft. Meade, Maryland,[4] causing approximately $1 million in damage to that helicopter (*Id.*).[5] Relator alleges that at a total cost to the United States of about $2,100,000,000, Boeing re-manufactured the Army's fleet of Chinook CH-47 A/B/C model helicopters into Chinook CH-47(D) and MH47D/E helicopters, and the contracted work to those helicopters was performed in an "incompetent and dangerous manner" by Defendant (doc. 367). Moreover, Relator asserts that each of these "unsuitably, re-manufactured helicopters" were delivered by Boeing to the Government by operation of a claim for payment in the form of a "Standard Form DD-250" that falsely represented that

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[3] Specifically, Relator asserts that "Aircraft 89-0165" (a CH-47(D) helicopter) was shipped by the Army, after delivery from Boeing, to the Persian Gulf for use in Operation Desert Shield/Desert Storm (doc. 367). Relator alleges that on January 11, 1991, during its 56th hour of operation, the defective transmission gear exploded, causing Aircraft 89-0165 to crash and catch fire (*Id.*). The resulting fire consumed the entire helicopter, a HMWWW truck, ammunition, and various essential equipment, including a howitzer and its tow vehicle (*Id.*). Relator contends that the United States Army replaced Aircraft 89-0165 by buying a new CH-47(D) fully-equipped helicopter at a replacement cost of more than $12.7 million (*Id.*).

[4] Relator submits that approximately eighteen months after the Saudi crash, and a year after Boeing reinspected the Speco-made gears, another transmission gear also broke due to a grinding crack and proximately caused the second helicopter incident at Ft. Meade, Md. (doc. 367). Relator alleges that about a half-a-dozen more Speco-made gears were pulled from service or inventory as a result of the 1993 Ft. Meade incident (*Id.*).

[5] Although there were reported injuries and the loss of military equipment associated with the helicopter incidents in question, there were no reported fatalities in either the Saudi crash or the Ft. Meade hard landing (*Id.*).

the contracted helicopters conformed to all of the specified contract requirements (*Id.*). Relator avers that it has evidence that Defendant acted in a reckless manner by installing the defective gears without adequate inspection (*Id.*). For example, Relator alleges that Boeing for at least ten years prior to the Saudi crash had prior knowledge that the transmission helicopter gears were prone to certain grinding cracks and breakage (*Id.*). Relator further alleges that the material from which the gears were made are especially susceptible to exactly the kind and type of burning and cracking that resulted in the crash of Aircraft 89-0165 (*Id.*).

Moreover, the Government and Relator aver in the Amended Complaint that "[b]y virtue of the acts described above, Boeing, by and through its officers, agents, and employees, knowingly submitted, and caused to be submitted, false or fraudulent claims for payment or approval to [its] officers, employees, or agents of the United States Government" (doc. 34). The Government concludes Count I with the contention that "[b]y reason of these payments made upon these false claims, the United States Government has been damaged as a result of Defendant's violations of the False Claims Act, arising under 31 U.S.C. §§ 3729(a)(1), (2), (3) & (7), for damages to be determined at trial . . . ." (*Id.*).

The Amended Complaint further asserts claims against Defendant for: (1) payment by mistake, (2) unjust enrichment, (3) breach of contract, and (4) common law fraud (doc. 34). The Government seeks to recover treble damages based on the value of the first CH-47(D) helicopter and its contents, for the cost of repairing the second aircraft, and to treble those damages under the False Claims Act of 1986 (*Id.*).[6] In addition, the Government asserts that it is entitled to treble

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[6] Relator asserts that Boeing paid Speco $4,874 for the cost of the defective gear involved in the Saudi crash, which Relator estimates to be less than one percent of the Government's actual loss (doc. 367).

damages for the delivery of other U.S. Army Chinook helicopters with allegedly non-conforming engine transmission gears that were manufactured by Speco from 1987 to 1995,[7] and statutory penalties of $5,0000 to $10,000 for the submission of each purportedly false claim for the helicopters in question (*Id.*).

In its Answer, Defendant submits a general denial of the Government's allegations of false claims, violations of the False Claims Act, and the resulting compensatory and statutory damages (doc. 161). Defendant defends by originally asserting a total of twelve (12) affirmative defenses that would individually or collectively relieve Defendant of all liability from the Government's claims (*Id.*).[8] Specifically, Defendant's Fifth Affirmative Defense states that the "United States cannot recover damages under the False Claims Act for the two helicopters, or their contents, which the [G]overnment alleges were lost or damaged as a consequence of defective parts . . . ." (doc. 340). Defendant asserts that the False Claims Act precludes recovery for product defects,

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[7] The Government contends that while the cost of the remanufactured helicopter involved in the Saudi crash was estimated at about $4 million, the cost for its replacement was well over $12 million (doc. 34).

[8] Defendant asserts the following affirmative defenses to the allegations set forth in the Amended Complaint: (1) failure to state a claim upon which relief can be granted; (2) the fraud cause of action is time-barred; (3) the damages sought are barred by the High-Value Items Clause; (4) estoppel due to the High-Value Items Clause; (5) consequential damages are not available; (6) no injury; (7) failure to plead fraud with particularity; (8) laches; (9) express contract; (10) special damages are not pled with specificity; (11) punitive damages are not pled with particularity; and (12) equitable estoppel (doc. 161). Note: Defendant's Third Affirmative Defense, the High-Value Items Clause, was dismissed pursuant to this Court's Order of November 2, 1999 (doc. 554).

consequential damages [9], or any other recovery not found in the statute itself (*Id.*).

On February 5, 1999, Defendant filed a Cross-Motion for Partial Summary Judgment as to the Measure of Damages (doc. 340) asserting that consequential damages are not recoverable under the False Claims Act. Thereafter, the Government filed a Response (doc. 366), Relator followed with his Response and Cross Motion for Summary Judgment as to the Measure of Damages (doc. 367), and Defendant filed its Reply on May 28, 1999 (doc. 401). Shortly thereafter, Relator filed his Reply (doc. 432). In addition, this Court heard oral arguments on the issue of consequential damages in relation to the False Claims Act on June 2, 1999 (doc. 444). On November 2, 1999, this Court issued an Order granting Aerospace Industries of America, Inc.'s (hereinafter, "Aerospace") an appearance in this action as *Amicus Curiae* and this Court will consider Aerospace's Motion in Support of Defendant's Cross-Motion for Partial Summary Judgment (doc. 402) in the Court's rulings on this matter. In addition, in our November 2nd Order, the Court also dismissed Defendant's Third Affirmative Defense, the High-Value Items Clause, and granted the Government's and Relator's motion for partial summary judgment on that issue (doc. 296) (*Id.*).[10] Finally, on November 12, 1999, Defendant filed a Motion Requesting the Court to Rule on Boeing's Cross-

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[9] Defendant argues that the Government's alleged replacement cost of over $12 million for the Saudi helicopter is considered to be consequential damages under the False Claims Act (doc. 340). Therefore, even if Defendant is found liable for submitting a false claim for the defective gears to the Government, Defendant avers that, it would be at most liable to the Government for the cost of the gears, and not the consequential damages that allegedly follows the submission of the false claim (*Id.*).

[10] *See United States ex rel. Roby v. Boeing Co.*, 73 F.Supp.2d 897, 912 (S.D.Ohio 1999) (doc. 554).

Motion for Partial Summary Judgment as to the Measure of Damages (doc. 556).

The Court believes it is important to note that, this Order will only address the primary issue of the applicability of Defendant's Fifth Affirmative Defense, which states that, "consequential damages are not recoverable under the False Claims Act" (doc. 340). Furthermore, any issues concerning the merits of the Government's and Relator's claims, or Defendant's remaining affirmative defenses will not be addressed by the Court in this Order. The Parties stipulate that for the purpose of summary judgment only, the Court may assume that liability against Defendant could be proven by the Government and Relator by a trial on the merits (docs. 340, 366 & 367). The Parties now move this Court to decide the purely legal question of what is the proper measure of damages in relation to the False Claims Act, and, specifically, are consequential damages available under the Act.

STANDARD OF REVIEW

The narrow question that we must decide on a motion for summary judgment is whether there exists a "genuine issue as to any material fact and [whether] the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The Supreme Court elaborated upon the appropriate standard in deciding a motion for summary judgment as follows:

> [T]he plain language of Rule 56© [sic] mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The moving party has the initial burden of showing the absence of a genuine issue of material fact as to an essential element of the non-movant's case. Id. at 321, 106 S.Ct. 2548;

Guarino v. Brookfield Township Trustees, 980 F.2d 399, 405 (6th Cir.1992); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir.1989). If the moving party meets this burden, then the non-moving party "must set forth specific facts showing there is a genuine issue for trial." Fed.R.Civ.P. 56(e); *see Guarino*, 980 F.2d at 405.

As the Supreme Court stated in *Celotex*, the non-moving party must "designate" specific facts showing there is a genuine issue for trial. *Celotex*, 477 U.S. at 324, 106 S.Ct. 2548; *Guarino*, 980 F.2d at 405. Although the burden might not require the non-moving party to "designate" facts by citing page numbers, "'the designated portions must be presented with enough specificity that the district court can readily identify the facts upon which the non-moving party relies.'" *Guarino*, 980 F.2d at 405 (quoting *InterRoyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir.1989), *cert. denied*, 494 U.S. 1091, 110 S.Ct. 1839, 108 L.Ed.2d 967 (1990)).

Summary judgment is not appropriate if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Conclusory allegations, however, are not sufficient to defeat a motion for summary judgment. *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1162 (6th Cir.1990).

DISCUSSION

I. *Introduction To The False Claims Act*

A. *The "Qui Tam" Provisions of the FCA* [11]

The False Claims Act (hereinafter, "the FCA"), which Congress originally enacted in 1863, is the government's "primary litigative tool for combating fraud" against the federal government. S.Rep. No. 99-345, 99th Cong., 2d Sess., at 2, reprinted in 1986 U.S.C.C.A.N. 5266. The Act authorizes both the Attorney General and private persons to bring civil actions to enforce the Act. 31 U.S.C. § 3730 (1999). Congress amended the FCA in 1986 to increase the financial and other incentives for private individuals to bring suits under the Act in the hopes of enlisting the aid of the citizenry in combating the rising problem of "sophisticated and widespread fraud." S.Rep. No. 99-345, at 2, 23-24 (1986).

Section 3730(b) of the FCA as now constituted provides that a person may bring a civil action for a violation of the substantive provisions of the Act "for the person and for the United States Government." 31 U.S.C. § 3730(b)(1). The action must be brought in the name of the government. *Id.* An action under this provision is termed a "*qui tam*"[12] suit, and the person who brings such an action is referred to as a

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[11] The following summary of the history of the FCA was compiled in its entirety by a review of the Congressional Record and from the relevant portions of the Seventh Circuit's decision in *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 745-46 (9th Cir.1993) (holding that a former employee of a government contractor who brought an action against the contractor under the *qui tam* provisions of the FCA, met the Article III standing requirements and did not violate the Due Process Clause of the U.S. Constitution).

[12] The term "*qui tam*" is short for "*qui tam pro domino rege quam pro se imposo sequitur*," which is interpreted as he "who brings the action as well for the king as for himself." *Bass Anglers Sportsman's Soc'y of America v. U.S. Plywood-Champion Papers, Inc.*, 324 F.Supp. 302, 305 (S.D.Tex.1971).

"relator" or "informer." *Id.* If the government files an action to enforce the FCA, a would-be relator may not later bring any action based on the same underlying facts. *Id.* § 3730(e)(3). Nor may a private party litigate a *qui tam* suit based on the public findings of a government investigation or on disclosures made in the news media, unless that party is an original and independent source of the information on which the complaint is based. *Id.* § 3730(e)(4)(A)-(B).

Upon bringing a *qui tam* action, a relator must serve on the government a copy of the complaint and written disclosure of substantially all material evidence and information the relator possesses. The complaint must be filed *in camera* and remain under seal for at least sixty (60) days so that the government may investigate the relator's allegations; though upon a showing of "good cause," the government may move the court for an extension of the sixty (60) day period. *Id.* § 3730(b)(2), (3). By the end of the period provided for the government to complete its investigation, the government must decide whether to intervene and proceed with the action, "in which case the action shall be conducted by the government;"[13] or whether to decline to take over the action, "in which case the person bringing the action shall have the right to conduct the action." *Id.* § 3730(b)(4)(B).

The original version of the FCA allowed anyone to bring a *qui tam* action and receive up to fifty percent (50%) of the amount recovered. S.Rep. No. 99-345, at 8-10 (1986). This broad provision led to abuse and in 1943, following the Supreme Court's decision in *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 546-47, 63 S.Ct. 379, 87 L.Ed. 443 (1943),[14] Congress amended the statute. The 1943 version of

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[13] *Id.* § 3730(b)(4)(A).

[14] In *Marcus*, the Supreme Court held that a relator could bring a *qui tam* action even though the action was based entirely upon information contained in the government indictment. *Id.*, 317 U.S. at 547-48, 63 S.Ct. 379 (1943).

the FCA precluded actions "based on evidence or information the Government had when the action was brought." *United States ex rel. Stinson v. Prudential Ins. Co.*, 944 F.2d 1149, 1153 (3d Cir.1991). This led to claims being barred even in cases where the *qui tam* supplied the information to the government before filing the claim. *See United States ex rel. State of Wis. v. Dean*, 729 F.2d 1100, 1106-07 (7th Cir.1984).[15]

In 1986, Congress again amended the FCA in order "to encourage any individual knowing of governmental fraud to bring that information forward." S.Rep. No. 99-345, at 2 (1986). According to the Third Circuit, in order "[t]o revitalize the *qui tam* provisions, the amendment provided incentives for private enforcement, including increased monetary awards, adopted a lower burden of proof, and allowed a *qui tam* to remain a party in the action even if the government intervenes." *Stinson*, 944 F.2d at 1154 (1991).

B. *FCA Case Law Applied*

As amended in 1986, the False Claims Act provides that the terms "'knowing and knowingly' mean that a person, with respect to information: (1) has actual knowledge of the information, (2) acts in deliberate ignorance of the truth or falsity of the information, or (3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required." 31 U.S.C. § 3729(b).

The archetypal *qui tam* action is filed by an employee at a private company who discovers his employer has overcharged for services or supplies under a government contract. *See United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953, 968-69 (9th Cir.1995) (holding that a former employee of a federal contractor, who had signed a release of all claims

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[15] The holding in *Dean*, was subsequently superseded by statute in a number of states (including Illinois, California, Maryland, Oklahoma, Virginia, Wisconsin, and Vermont).

against the contractor in settlement of an earlier litigation, then the same employee brought a *qui tam* action against the same contractor under the FCA, and, nonetheless, was allowed to sue that contractor). However, FCA actions have also been sustained under theories of supplying substandard products or services;[16] false negotiation, including bid rigging and defective pricing;[17] and false certification[18].

In *United States v. Bornstein*, 423 U.S. 303, 311, 96 S.Ct. 523, 46 L.Ed.2d 514 (1976), the Supreme Court reviewed the FCA in order to differentiate contracts from claims[19] that were submitted under contracts, holding that only the latter gave rise to liability under the FCA. The Supreme Court held that the defendant was liable under the statute because he engaged in conduct that caused the false claims to be submitted to the United States, and the Court explained that:

> [w]hile it is true that no false claims would have been submitted had [the defendant] and [its prime contractor] not entered into a contractual relationship, the entry into that relationship did not in itself cause the submission of

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[16] *See United States v. Aerodex, Inc.*, 469 F.2d 1003 (5th Cir.1972).

[17] *See United States v. Ehrlich*, 643 F.2d 634 (9th Cir.1981); *see also United States ex rel. Compton v. Midwest Specialties, Inc.*, 142 F.3d 296 (6th Cir.1998).

[18] *See United States ex rel. Hopper v. Anton*, 91 F.3d 1261 (9th Cir.1996).

[19] The term "claim" is defined in 31 U.S.C. § 3729 of the False Claims Act and provides, in pertinent part, that:

> [f]or purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property, which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

Id. § 3729(c).

> any false claims . . . The language of the statute focuses on false claims, not on contracts.

Id. at 311 (1976) (discussing *Marcus*, 317 U.S. at 552, 63 S.Ct. 379 (1943)). Similarly, in *United States v. Ueber*, 299 F.2d 310, 313 (6th Cir.1962), the Sixth Circuit held that a cause of action under the FCA did not arise "until the first voucher seeking payment of the false claims was presented to the United States."[20] In another case, the Sixth Circuit explained that if the "government [is] seeking to state a claim under the FCA [the government] must allege a false claim for payment made upon the government, not merely a fraudulent contract." *Kaminski v. Teledyne Indus., Inc.*, 121 F.3d 708, No. 96-3620, 1997 WL 415314, at *4 (6th Cir. July 21, 1997).

II. *The Proper Measure Of Damages Under The False Claims Act*

A. *Introduction*

The amended FCA provides that any person who knowingly presents a false or fraudulent claim to the United States "is liable to the United States Government for a civil penalty . . . plus three (3) times the amount of damages which the Government sustains because of the act of that person." 31 U.S.C. § 3729(a) (1999).[21] The FCA itself does not specify how to quantify damages, but instead states that the Government should be awarded damages that it "sustains because of" the contractor's fraudulent acts. *Id.* § 3729(a),

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[20] *See also United States v. Ekelman & Assocs., Inc.*, 532 F.2d 545, 551-52 (6th Cir.1976) (stating that "no cause of action arises . . . until the [defendant] presents a claim to the [government] for payment . . . .").

[21] The FCA also contains an exception for those who voluntarily inform the government within thirty (30) days of learning of the false claim and were not subject to a governmental investigation prior to the disclosure to the government. Persons falling within this exception can limit their damages to two (2) times the amount of damages sustained by the government. *Id.*

(b) (1999). In *United States ex rel. Marcus v. Hess*, the Supreme Court established a simple "out of pocket" measure for the recovery of damages. 317 U.S. at 551-52, 63 S.Ct. 379 (1943). The Court found that damages under the FCA are intended to "provide for restitution to the government of money taken from it by fraud . . . ." *Id.* Trebling the damages and imposing penalties "was chosen to make sure that the government would be made completely whole." *Id.* The *Marcus* Court used a "but for" test in its analysis of FCA damages.[22] In other words, a court should ask the question of, "How much would the government have paid for the item at issue 'but for' the fraudulent actions of the defendant?"[23] This amount would be the proper measure of damages according to the *Marcus* court. *Id.* at 551-52, 63 S.Ct. 379 (1943).

Because each case under the FCA involves unique types of damage to the government, a formula for calculating damages must be created for each case that will provide the government with its damages directly caused by the filing of a false claim. *BMY—Combat Systems Div. of Harsco Corp. v. United States*, 44 Fed.Cl. 141, 147-48 (Fed.Cl. 1999). In addition, the Ninth Circuit Court of Appeals found that "[o]rdinarily the measure of the government's damages would be the amount that it paid out by reason of the false [claims] over and above what it would have paid if the claims had been truthful." *United States v. Woodbury*, 359 F.2d 370, 379 (9th Cir.1966). In *United States v. Bornstein*, the Court applied a similar "benefit of the bargain" approach to calculating damages in FCA cases. 423 U.S. at 317 n. 13, 96 S.Ct. 523 (1976). The Supreme Court held that "[t]he Government's actual damages are equal to the difference between the market value [of the item] it received and retained, and the

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[22] *See* Michael A. DiSabatino, *Measure and Elements of Damages Under the False Claims Act*, 1977 WL 45669, 35 A.L.R. Fed. 805 (1977).

[23] *Id.*

market value [that the item] would have had if they had been of the specified quality." *Id.*[24] The *Bornstein* Court cited *United States v. Ben Grunstein & Sons Co.*,[25] as a basis for its choice of the "benefit of the bargain" or "market value" approach. *Id.* The district court in *Grunstein* defined the proper measure of damages as "the value of the property which the person defrauded would have received but for the fraud, less, as a credit, the value of the property which he has in fact received." *Id.*, 137 F.Supp. at 205 (1955).

Courts which have decided the issue thus far have confined their decisions to the particular type of fraud involved in each case. While the Supreme Court in *Bornstein* used a "benefit of the bargain" theory of damages, it did not overturn the "out of pocket" measure applied by the *Marcus* Court; which would infer that the Supreme Court will consider any reasonable method of calculating damages which will fairly reimburse the government for its losses and expenses, without creating a windfall for the government. *See Daff v. United States*, 31 Fed. Cl. 682, 695 (1994) (awarding as FCA damages the government's inspection and repair costs when the contractor had fraudulently concealed the failure of the product to pass the contractually required tests).[26]

We will now review the case law on consequential damages as applied in the federal courts. In the Fifth Circuit case that is highlighted in the next section, the court held that

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[24] This is also referred to as a product's "diminished value," and is measured by calculating the fair market value of the product(s) the government contracted to buy less the fair market value of the product(s) that was actually received and retained. *See* C. Stanley Dees, *Beyond "Diminished Value": New Challenges in the Law of Civil False Claims Act Damages*, 25 Pub. Cont. L.J. 597, 599 (1996). However, in cases in which the market value of the product(s) is speculative, the court may utilize the contract price to establish damages. *Id.*

[25] 137 F.Supp. 197, 205 (D.N.J.1955).

[26] *See also* Anna Burke, *Qui Tam; Blowing the Whistle for Uncle Sam*, 21 Nova L.Rev. 869, 911 (1997).

the government could not recover consequential damages resulting from the delivery of defective goods under a FCA theory of recovery.[27]

B. *United States v. Aerodex and Consequential Damages*

Questions regarding the meaning of "damages" under the FCA have their roots in the old act, which contained language virtually identical to the current damages provision.[28] The scope of the term "damages" was first addressed in the seminal case of *United States v. Aerodex*. In *Aerodex*, defendants were found civilly liable under the FCA for knowingly delivering contractually nonconforming ball bearings to the Navy Department. *Id.* 469 F.2d at 1013 (1972). Under its contract, Aerodex had delivered 300 nonconforming bearings at a price of $90 each for a total contract price of $27,000. *Id.* at 1006. The Navy subsequently

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[27] The following excerpt on the common law rule of contract damages is taken from the contract treatise of John D. Calamari, *The Law of Contracts* § 14.5 (4th ed.1998):

The Rule of Hadley v. Baxendale—

(a) *Economic Injury*—Prior to 1854 there were almost no rules of contract damages. The assessment of damages was for the most part left to the unfettered discretion of the jury. In 1854, *Hadley v. Baxendale* was decided. 156 Eng. Rep. 145 (1854). It has won almost universal acceptance in the common law world and remains the leading case in the field. Under the first rule of *Hadley v. Baxendale*, certain damages will so naturally and obviously flow from the breach that everyone is deemed to contemplate them. Frequently such damages are known as "general damages." Under the second rule, less obvious kinds of damages are deemed to be contemplated if the promissor knows, or has reasons to know, the special circumstances which will give rise to such damages. Such damages are frequently known as "special" or "consequential damages."

Id.

[28] *See* Michael Waldman, "*Damage Control*": *A Defendant's Approach to the Damage and Penalty Provisions of the Civil False Claims Act*, 21 Pub. Cont. L.J. 131, 136 (1992).

discovered the product substitution, removed the ball bearings and replaced them at a cost of $160,000. *Id.* In assessing damages, the district court included not only the contract price the Navy paid, $27,000, but also the $160,000 in "repair costs." *Id.*

The Fifth Circuit reversed the district court's damages calculation. *Id.* at 1011 (1972). The court noted that in cases involving defective products, the United States should receive as damages the difference between the reasonable value of the goods delivered and the price the government actually paid for the goods. *Id.* The *Aerodex* court concluded that the repair costs were consequential damages, and, as such, those costs were not recoverable under the Act:

> [W]e hold that the language of the False Claims Act does not include consequential damages resulting from the delivery of defective goods. The statute assesses double damages attributable to the "act," which in this case is the submission of the false vouchers. The submission of these vouchers was not the cause of the government's consequential damages. The delivery and installation of the bearings in the airplanes, not the filing of the false claim, caused the consequential damages.

Id. at 1011 (1972); *see also Woodbury*, 359 F.2d at 379 (1966) ("In a case of this kind, damages under the False Claim Act must be measured by the amount wrongfully paid to satisfy the false claim."). Thus, the United States in *Aerodex* was entitled to only the contract price doubled, or $54,000, and not the more than $370,000 that was originally awarded the government by the district court. *Id.*

The FCA cases that came after *Aerodex*, but before the 1986 Amendments, "muddied the waters" as to the recoverability of consequential damages.[29] While some of these

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[29] *See* James Dever, *Double Jeopardy, False Claims, and United States v. Halper*, 20 Pub. Cont. L.J. 56, 86 (1990).

decisions adhered closely to *Aerodex* in denying any economic or consequential loss outside of the contract price,[30] other courts have showed a greater willingness to allow the recovery of the various costs incurred by the government beyond the mere value of the contract.[31] Like a number of post-*Aerodex* courts, the Sixth Circuit in *Ekelman & Assocs*, found that *Aerodex* was distinguishable on its facts and also found that its holding "was not inconsistent with" the Fifth Circuit's holding in *Aerodex*. 532 F.2d at 545 (1976).[32]

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[30] *See, e.g., United States v. Miller*, 645 F.2d 473, 475-76 (5th Cir.1981) (holding that the United States cannot recover consequential damages under the Act); *United States v. Hibbs*, 568 F.2d 347, 351-352 (3d Cir.1977) (holding that the United States must show a causal connection between the loss and the fraudulent conduct, and also finding that a broad "but for" test is not consistent with the Act).

[31] se [sic] *See e.g., Toepleman v. United States*, 263 F.2d 697, 700-01 (4th Cir.1959) (holding that the United States is entitled to recover double the loss it suffered "but for the fraud"); *United States v. Woodbury*, 359 F.2d 370, 379 (9th Cir.1966) (holding that the United States may recover "money spent by its employees in straightening out the mess [caused by the false claims] and in protecting its interest thereafter"); *United States v. Ekelman & Assocs., Inc.*, 532 F.2d 545, 550-51 (6th Cir.1976) (holding that the United States can recover not only the payment to discharge insured loans obtained through false claims, but also the reasonable expenses incurred in preserving the properties that served as collateral for the loans).

[32] In *Ekelman & Assocs.*, the government spent money maintaining property after the defendants went into default on a loan obtained through falsified applications. *Id.*, 532 F.2d at 547. These "maintenance costs" (i.e., "incidental expenses") incurred after foreclosure, were included within the government's damage award. *Id.* The Sixth Circuit distinguished *Aerodex*, stating that it was not inconsistent with this decision, indicating a possible effort to distinguish between "incidental or maintenance" damages and "economic or consequential" damages. *Id.*; *see also* Kara Nicole Schmidt, *Privatizing Enviromental Enforcement: The Bounty Incentives of the False Claims Act*, 9 Geo. Int'l Envtl. L.Rev. 663, 678 (1997).

C. *The 1986 Amendments and Consequential Damages* [33]

Initially, Congress indicated that the 1986 Amendments would permit the recovery of consequential damages under the Act. The Senate bill would have amended 31 U.S.C. § 3729(a) to read as follows: "A person is liable to the United States Government for a civil penalty of $10,000, an amount equal to three (3) times the amount of damages, in addition to the amount of consequential damages the Government sustains because of the act of that person . . . ." S.Rep. No. 345, 99th Cong., 2d Sess. 39 (1986). The bill defined consequential damages as those which the United States would not have sustained "but for" the violation of the Act or "having entered into or made any contract or grant as a result of any material part of any false statement." *Id.* at 39-40 (discussing changes to § 3729(b)). The Senate expressly rejected the "narrow and form bound interpretation of the act" found in *Aerodex*. S.Rep. No. 345, 99th Cong., 2d Sess. 19, reprinted in 1986 U.S.Code Cong. & Admin. News 5284. Originally, the House bill also contained language concerning consequential damages. H.R.Rep. No. 660, 99th Cong., 2d Sess. 1-2 (1986). The House bill would have amended § 3729(a) to read as follows: "[Any person who violates the Act] is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, for an amount equal to consequential damages as set forth in subsection (b)(1) plus two (2) times the amount of damages (other than such consequential damages) which the Government sustains because of the act of that person . . . ."

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[33] The following summary of the legislative history of the 1986 Amendments in relation to the issue of consequential damages was compiled in its entirety by a review of the Congressional Record and from relevant portions of the following law review article: James Dever, *Double Jeopardy, False Claims, and United States v. Halper*, 20 Pub. Cont. L.J. 56, 86 (1990).

Id. Subsection (b)(1) defined consequential damages in a manner similar to the Senate bill. *Id.* at 2.

Although both the House and the Senate initially agreed that consequential damages would be recoverable under the Act and that such damages would not be trebled, Senator Grassley offered an amendment on October 3, 1986, deleting any mention of consequential damages. 132 Cong. Rec. S15018-23 (daily ed. Oct. 3, 1986). Senator Grassley explained that House and Senate negotiators had met and reconciled their differences in the House and Senate bills. 132 Cong. Rec. S15515 (daily ed. Oct. 7, 1986) (statement of Sen. Grassley); *cf.* 132 Cong. Rec. H6481 (Sept. 9, 1986) (statement of Rep. Brown) (expressing hope that the Congressional conference would limit consequential damages to those which are reasonably foreseeable and proximately caused by the prohibited acts). As part of that process, forfeitures would be determined by the court "within the range of $5,000 to $10,000, and consequential damages will not be recoverable under the Act." 132 Cong. Rec. S15515 (daily ed. Oct. 7, 1986) (statement of Sen. Grassley). The House agreed to the change, but did not explain why the change was made. *See* 132 Cong. Rec. H9382-83, 9388 (daily ed. Oct. 7, 1986) (statement of Rep. Glickman). Thus, post-1986 Amendments courts are left to analyze arguments concerning causation in order to determine whether damages were sustained "because of the act." 31 U.S.C. § 3729(a) (1988).

Furthermore, the question of consequential damages does not appear to be settled at the present time. After a review of the most recent and relevant case holdings addressing this issue, we find that almost all of these cases are distinguished by the particular facts of the case in question. The holdings range from those that adhere strictly to the *Aerodex* ruling, and those that expand upon the holding of *Aerodex* in their award of additional recovery beyond the value of the item in question. The only consistency in the various cases that

address the issue of the proper measure of recovery under the FCA, is that all of the courts attempt to find a way to "make the government whole."

D. *The Parties's Arguments*

1. *Boeing's and Aerospace's Arguments* [34]

In Defendant's Cross-Motion for Partial Summary Judgment (doc. 340) and Aerospace's Motion in Support of Defendant's Cross-Motion (doc. 402), Defendants seeks summary judgment as a matter of law as to their Fifth Affirmative Defense. The Fifth Affirmative Defense is brought on the grounds that the Government cannot recover damages under the FCA for replacement and repair costs of the destroyed or damaged helicopters, or their contents, which the Government alleges were lost or damaged as a result of the defective component parts (the transmission gears) that were supplied by Speco and Boeing (*Id.*). Defendants assert that the Government's attempt to recover for the loss or damage of the helicopters under a False Claims Act theory of recovery is founded on a "fallacious assumption" for several reasons (*Id.*).

First, Defendants allege that the FCA is not a products liability statute. Defendants also allege that damages under the FCA are those that result from the submission and payment of a false claim and not the damages that flows from any defect in the product for which a claim is made. Furthermore, Defendants assert that it is unaware of any case in which the Government has recovered under the FCA for damage to property or persons that resulted from an underlying product defect.

Second, Defendants contend that the Supreme Court has stated unambiguously that the appropriate measure on which to base damages under the FCA is the difference between the

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[34] For purposes of this section of the Order only, Boeing and Aerospace will be referred to hereinafter, as "Defendants."

value of the claims paid and the value of the goods as delivered. *See Bornstein*, 423 U.S. at 317 n. 13, 96 S.Ct. 523 (1976). With respect to FCA claims involving the delivery of defective products, Defendants submit that, this rule is applied to compensate the Government for an amount reflective of any inferior product delivered to it, and not for the resulting damages caused by a product's defect. *See Aerodex*, 469 F.2d at 1011 (1972) (holding that the FCA does not include consequential damages resulting from the delivery of defective goods).

Third, Defendants allege that even if all of the Government's and Relator's allegations contained in the Amended Complaint (doc. 34) could be proven as true, the helicopter damages would not stem from the submission of a claim, but rather from an alleged failure in the operation of the purportedly defective gears. Thus, according to Defendants, the helicopter damages are not compensable under a FCA theory of recovery (*Id.*).[35] *See Commercial Contractors, Inc. v. United States*, 154 F.3d 1357, 1371-72 (Fed. Cir.1998) (holding that the government must prove that it sustained an actual loss "as a result of the contractor's false or fraudulent claim").

Fourth, Defendants argue that the proper measure of FCA damages in this case is the difference between the value of

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[35] Defendants assert that the Fifth Circuit in *Aerodex* held that the cost of removal and replacement of the defective product is not compensable under the FCA:

> [T]he language of the False Claims Act does not include consequential damages resulting from the delivery of defective goods. The statute assesses double damages attributable to the "act," which in this case is the submission of the false vouchers. The submission of these vouchers was not the cause of the government's consequential damages. The delivery and installation of the bearings in airplanes, not the filing of the false claim, caused the consequential damages.

Id. at 1011 (1972).

noncompliant gears and the value of the compliant gears. Moreover, Defendants assert that this is the established rule for damages in FCA claims premised on the delivery of defective goods. As set out in *Aerodex*, such damages are to be measured by "the amount wrongfully paid to satisfy the false claim." 469 F.2d at 1011 (1972). Simply put, Defendants maintain that, even if the Government's allegations were proven as true by a trial on the merits, the Government would then be "entitled to a judgment . . . in an amount which reflects only the actually defective or inferior [item] delivered to the Government." *See United States v. Collyer Insulated Wire Co.*, 94 F.Supp. 493, 498 (D.R.I.1950).[36] Thus, Defendants submit that the proper measure of damages in the FCA claim at issue would be to treble the damages for the "diminished value" of any defective, transmission gears; and any additional statutory penalties that are applicable for each purported false claim submitted.

2. *The Government's and Relator's Arguments* [37]

In the Government's Response (doc. 366) and Realtor's Response and Cross-Motion for Summary Judgment (doc. 367), Plaintiffs also seek summary judgment as a matter of law as to the Fifth Affirmative Defense asserted by Defendant. Plaintiffs assert that the United States may recover full replacement and repair costs under the FCA for the helicopters that were destroyed or damaged due to their internal defects. Plaintiffs argue that the proper measure of

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[36] *See also United States ex rel. Compton v. Midwest Specialties*, 142 F.3d at 304 (1998) (finding that the proper measure of damages under the FCA is the difference between the value of goods as delivered and the value of goods as promised); *United States v. Cooperative Grain & Supply Co.*, 476 F.2d 47, 62 (8th Cir.1973) ("'[T]he measure of the government's damages would be the amount that it paid out by reason of the false statements over and above what it would have paid if the claims had been truthful.'") (quoting *Woodbury*, 359 F.2d at 379 (1966)).

[37] For purposes of this section of the Order only, the Government and Relator will be referred to hereinafter, as "Plaintiffs."

damages in this case according to the Supreme Court and the Sixth Circuit precedents is whatever it takes "to make the Government whole" once liability is established. *See Marcus*, 317 U.S. at 551-52, 63 S.Ct. 379 (1943) ("Damages awarded under the False Claims Act typically are liberally calculated to ensure that they 'afford the government complete indemnity for the injury done it.'"), *accord*, *Bornstein*, 423 U.S. at 314-15, 96 S.Ct. 523 (1976).[38] Plaintiffs also set forth several points in order to counter the arguments presented by Defendants in their Cross-Motion for Partial Summary Judgment (docs. 340 & 402).

First, Plaintiffs counter Defendants arguments by asserting that it is an "irrefutable fact" that the United States did not buy gears from Boeing. Rather, Plaintiffs claim that the United States bought helicopters from Boeing that contained defective gears. Moreover, Plaintiffs allege that *Aerodex* and the issue of consequential damages is not applicable to the facts and issues at bar. Plaintiffs further allege that Boeing submitted claims to the United States which represented that the CH-47(D) helicopters conformed to the contract specifications, when Boeing knew all along that the helicopters did not conform to the contract requirement. Therefore, Plaintiffs reason that, the damage to the helicopters resulting from the failure of the Speco-made gears is direct, and not consequential, damages under the FCA. Plaintiffs assert that nothing in *Aerodex* is contrary to Plaintiffs' damages analysis in this case.

Second, Plaintiffs contend that damages under the FCA are designed to make the United States whole and submit that the Supreme Court has taken an "expansive view" on the issue of

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[38] *See also Compton*, 142 F.3d at 304 (1998) ("While Midwest cites to several cases supporting the practice of deducting the value received by the government from any damage award, even these cases recognize that the government is entitled to full damages where it proves it received no value at all.").

damages that are available under the FCA. *See Marcus*, 317 U.S. at 551-52, 63 S.Ct. 379 (1943) (finding that the chief purpose of the FCA was to provide restitution to make sure the government would be made completely whole); *see also Compton*, 142 F.3d at 304 (1998) ("Damages awarded under the False Claims Act typically are liberally calculated to ensure that they 'afford the government complete indemnity for the injuries done it.'") (quoting *Marcus*, 317 U.S. at 549, 63 S.Ct. 379). Therefore, Plaintiffs argue that, in order for the United States to be made whole in this case, its recovery must include the replacement and repair costs of the destroyed and damaged helicopters. *See Faulk v. United States*, 198 F.2d 169, 173 (5th Cir.1952) (finding that under a FCA theory of recovery, there is flexibility in measuring damages, and, subsequently, affirming the district court's refusal to instruct the jury on the market value of reconstituted milk because the unconsumed milk had no market value to the Army).

Third, although Boeing "knew," within the meaning of the FCA, that the gears did not comply with the contract requirements, Plaintiffs allege that Boeing, nonetheless, submitted claims for the repayment of the helicopters which were represented as being in conformance with the contract specifications, including the specifications concerning the transmission gears. Furthermore, Plaintiffs allege that two of these helicopters failed while in flight due to the non-conformities in the transmission gears, namely cracks in or near the dampening ring groves. Plaintiffs reason that the end result is that the damages to these helicopters are direct, and not consequential. Thus, Plaintiffs argue that damages, such as those described above, which are the natural and proximate cause of an occurrence are not considered "consequential

damages," but rather are deemed "direct damages."[39] *See Grunstein & Sons*, 137 F.Supp. at 210 (1955) (finding that the FCA provides for "damages that naturally and proximately resulted from the fraud").

Fourth, Plaintiffs contend that not only is the replacement cost of the helicopters recoverable under the FCA, but more recent court decisions have also allowed the exact sort of damages that were previously disallowed by the Fifth Circuit in *Aerodex*.[40] *See BMY—Combat*, 44 Fed.Cl. 141, 149-52. Plaintiffs submit that if Defendant is found liable in this action, then it should be required to pay the full replacement, repair, and retrofitting costs of the destroyed and damaged CH-47(D) helicopters.

Finally, Plaintiffs argue that *Aerodex* is simply not consistent with the principle of awarding the United States all of its damages in order to make it completely whole, as required by *Marcus, Bornstein, Ekelman & Assocs.*, *Compton*, and *BMY-Combat*. Moreover, Plaintiffs assert that *Aerodex*'s reasoning is based upon unique facts, because the court determined that a different theory of recovery (breach of warranty) was an alternate means by which the government could recover for its ball bearing-removal damages, without doubling the value of the claim or awarding

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[39] "Direct damages" are defined by *Black's Law Dictionary*, 270-71 (6th ed.1990) as:

> Direct damages are such as follow immediately upon the act done. Damages which arise naturally or ordinarily from a breach of contract; they are damages which in the ordinary course of human experience, can be expected to result from a breach.

Id.

[40] Plaintiffs further contend that even in *Aerodex*, the Fifth Circuit affirmed the award of double the entire contract price for the mislabeled and misnumbered ball bearings because the mislabeled bearings had no value to the United States, which never received what it contracted to receive. *Id.* at 1011 (1972).

consequential damages. *Id.* at 1012 (1972). Plaintiffs reason that *Aerodex* is an example of "rough justice" in which "the court doubled the entire contract price without requiring a relatively small component manufacturer to bear the cost of damages it did not directly control, while still making the government whole" (docs. 366 & 367). Thus, Plaintiffs state that "the wooden application of *Aerodex* which Boeing now advocates is demonstrably inconsistent with both the old and new holdings of the Sixth Circuit" (doc. 367). *See Ekelman & Assocs.*, 532 F.2d at 551 (1976) (affirming the district court's conclusion that the post-foreclosure expenses were recoverable under the FCA).

III. *The Court's Analysis*

There are essentially two issues presented to this Court by the Parties in this matter. The first issue is relatively simple and straight forward: "Are consequential damages recoverable under the False Claims Act?" The second issue is much more complicated, fact dependent, and unsettled: "Assuming Defendant is found liable in this action at a trial on the merits, would the Government's helicopter damages, and the related expenses associated with it, be considered consequential damages or direct damages under the False Claims Act of 1986?"

A. *Consequential Damages*[41] *Are Not Available Under The FCA*

This Court holds as a matter of law that consequential damages are not available, and, thus, are not recoverable under the False Claims Act of 1986. There are several reasons that leads the Court to this conclusion.

First, in the Court's November 2, 1999 Order (doc. 554), we held as a matter of law in this same action that the High-Value Items Clause (hereinafter, "the HVIC") was inapplicable to the False Claims Act because the Act itself was silent as to whether the HVIC provided a contractor-defendant an affirmative defense to violations under the statute. *Roby v. Boeing*, 73 F.Supp.2d 897, 910. In reaching this conclusion the Court explained that:

> [t]he very fact that Congress was willing to amend the terms and provisions of the FCA in 1943 and 1986, while not including the application of the HVIC as a limitation or defense to the statute's penalty provisions, is powerful evidence that Congress never planned for the HVIC's applicability to the FCA.

Id. For exactly the same reason, this Court must also hold that consequential damages are not applicable to the FCA. The record is undisputed that the issue of consequential damages was proposed, debated, and considered by the Congress during the 1986 Amendments to the FCA. However, the Congress, in its ultimate wisdom, decided to exclude the recovery of consequential damages from the final version of

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[41] Black's *Law Dictionary* 270-71 (6th ed.1990) defines "consequential damages" as:

> "[s]uch damage, loss or injury as does not flow directly and immediately from the act of the party, but only from some of the consequences or results of such an act;" and as "[d]amages which arise from the intervention of special circumstances not ordinarily predictable."

Id.

the Act.[42] This Court is unwilling to interpret the FCA in the way that the Government and Relator may want in this case. Moreover, the power to amend the statute rests with the Congress and the power to disagree with the holding of *Aerodex* and its progeny rests with the Sixth Circuit. This Court can only highlight that, as of the date of this Order, neither the Congress nor the Sixth Circuit has found consequential damages to be recoverable under the FCA. Furthermore, we cannot substitute our judgment for the will of Congress or the precedents's of this Circuit.

Second, the Supreme Court has explained that the proper measure of damages for false claims are calculated by the differences in the value between what the government contracted for and what the government actually received. *See Bornstein*, 423 U.S. at 317 n. 13, 96 S.Ct. 523 (1976) ("The Government's actual damages are equal to the differ ence between the market value of the tubes it received and retained, and the market value that the tubes would have had if they had been of the specified quality.").

Third, the Government and Relator cite frequently to the case of *BMY-Combat*, in which the court stated it was "likely" to allow recovery for damages such as the costs to inspect and repair the defective brackets installed in the howitzers. *Id.* 44 Fed.Cl. at 147-48. There are two important points that the Government and Relator overlook in their reliance on *BMY-Combat*. The court adopted the holding of *Aerodex* stating that consequential damages are un-

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[42] On the floor of the House, the leading proponent of the 1986 Amendment to the FCA, Rep. Glickman, explained that the bill that emerged from conference "provides for treble damages and deletes consequential damages." 132 Cong. Rec. 29,321 (1986).

available under the FCA,[43] and the court did not grant the government's motion for summary judgment on their theory of damages. *Id.* at 152-53 (1999).

After reviewing the Parties' briefs, exhibits, and evidence and after considering the oral arguments presented at the June 2, 1999 hearing, the Court concludes that there are no genuine issues of material fact that preclude the Court from rendering a judgment as to the merits of Defendant's Cross-Motion for Partial Summary Judgment (doc. 340). Therefore, for the reasons set forth above, this Court finds Defendant's arguments as to the general issue of consequential damages to be well-taken.

B. *Alternate Theories of Recovery Are Available Under the FCA*

This Court having found in favor of Defendant on the issue of consequential damages as not being recoverable under the False Claims Act of 1986, cannot so find that the Government and Relator are unable to recover the replacement and repair value of the destroyed and damaged helicopters, as well as the related costs and expenses associated with it. The damages in this case must be determined by the application of proximate causation [44] and

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[43] The *BMY-Combat* court stated that:

> Courts utilize several methods of damage calculations intended to ensure that the government receives 'the benefit of its bargain,' being careful not to award consequential damages.

Id. at 149 (1999) (citing *Aerodex*, 469 F.2d at 1011 (1972)).

[44] "Proximate cause" is defined in *Black's Law Dictionary*, 852 (6th ed. 1990) as:

> Proximate cause is that which in a natural and continuous sequence, unbroken by any efficient intervening causes, produces injury, and without which the result would not have occurred.

Id.

foreseeability,[45] in an effort to make the Government whole. However, this "begs the question: make whole for what?" The answer to this question is supplied by the Sixth Circuit. "Damages awarded under the False Claims Act typically are calculated to ensure that they 'afford the government complete indemnity for the injury done it.'" *Compton*, 142 F.3d at 304 (1998) (quoting *Marcus*, 317 U.S. at 549, 63 S.Ct. 379 (1943)). In a motion for summary judgment, the Court must assume as true the facts of the non-movant (i.e., Relator) as true. Indeed, Defendant asserts in its Cross-Motion that even if the Government' and Relator's facts are true, they still could not recover any more than the cost of the defective transmission gears in question.[46] This Court finds, assuming Defendant is found liable at a trial on the merits, that genuine issues of material fact preclude the Court from granting summary judgment on the issue of the recovery of the replacement and repair costs of the helicopters in question for several reasons.

First, *Bornstein* in no way purports to establish a "fixed rule of damages."[47] The Supreme Court reaffirmed in *Bornstein* what it had earlier held in *Marcus*—that "the device of double damages plus a specific sum [as a civil penalty] was

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[45] "Foreseeability" is defined in *Black's law Dictionary*, 449 (6th ed. 1990) as:

> Foreseeability is that which is objectively reasonable to expect, not merely what might conceivably occur.

Id.

[46] The transmission gears in question had a estimated value in 1993 to be approximately $5,000 in 1991 (*see* docs. 366 & 367). The CH-47(D) helicopter have an estimated replacement value of approximately 12 million.

[47] *Bornstein* was concerned only with the issue of damages and penalties against a subcontractor who causes the prime contractor to submit false claims. 423 U.S. at 306, 96 S.Ct. 523 (1976). The prime contractor in that case had already settled with the government. *Id.*

chosen to make sure that the government would be made completely whole." *Id.* 423 U.S. at 314, 96 S.Ct. 523 (1976) (quoting *Marcus*, 317 U.S. at 551-52, 63 S.Ct. 379 (1943)). Indeed, other courts have recognized that *Bornstein* did not purport to lay down an immutable rule of damages. *See BMY-Combat*, 44 Fed.Cl. at 147 ("Because each case under the FCA involves unique types of damage to the government, a formula for calculating damages must be created for each case that will provide the government with its damages directly caused by the filing of a false claim.").[48] Defendant has not cited to a single FCA case in which products were destroyed as a result of a latent defect in a bad part, and, subsequently, the government's damages were calculated on the basis of the value of only the part. In fact, after a thorough review of the case law in this area, this Court has not found any case which is on point with the facts and issues of the case at bar. Therefore, cases such as *Bornstein* and *Aerodex*[49] can serve only as a guide, but does not establish a "one-size-fits-all" damages interpretation.[50]

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[48] The Eleventh Circuit explained in *United States v. Killough*, 848 F.2d 1523, 1532 (11th Cir.1988) that:

> [n]o single rule can be, or should be, stated for the determination of damages under the Act . . . Fraudulent interference with the government's activities damages the government in numerous ways that vary from case to case. Accordingly, the [Congressional Committee] believes that the courts should remain free to fashion the measure of damages on a case by case basis.

Id. (quoting S.Rep. No. 615, 96th Cong.2d Sess. at 4 (1986)).

[49] The case at bar is also distinguishable from *Aerodex* in several ways including: (1) *Aerodex* involved a manufacturer of component parts, while Boeing is a manufacturer of helicopters; (2) *Aerodex* involved delivery of individual components for later installation into airplanes, while Relator alleges that Boeing led the United States to believe that the helicopters that were delivered, "required nothing more than a pre-flight check and a Chinook pilot's expertise" (doc. 367). Note: The Court recognizes that

Second, Defendant asserts that the proper measure of damages in this case is the difference between the value of the helicopter with a good gear and the value of the same helicopter with a bad gear. We find that Defendant's proposed measure of damages may fail in light of the Government's and Relator's claims. The Government and Realtor aver that the value of the helicopter as delivered was less than nothing: "Boeing's false certification of compliance rendered the helicopter not only non-air worthy, but a hazard to the soldiers whose orders required them to occupy it in flight" (doc. 432). *See Compton*, 142 F.3d at 304 (1998) (finding that the value of the product delivered to the government was zero, the court awarded the government the full contract price).[51] For example, if indeed the Government

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Relator's allegations are but one of the many factual disputes that exist between the Parties to this litigation.

[50] The Supreme Court in *Bornstein* addressed the very issue of a "one-size-fits-all" approach to assessing damages under the FCA:

> To equate the number of forfeitures with the number of contracts would in a case such as this result in almost always in a single forfeiture, no matter how many fraudulent acts the subcontractor might have committed. This result would not only be at odds with the statutory language; it would also defeat the statutory purpose. Such a limitation would in the language of the Government's brief, convert the Act's forfeiture provision into little more than a $2,000 license for subcontractor fraud.

Bornstein, 423 U.S. at 311, 96 S.Ct. 523 (1976).

[51] Defendant contends that "the Government cannot realistically assert that the helicopters as delivered to the Army possessed no value" (doc. 401). However, Relator replies that:

> [h]ere, the "value" of Helicopter 89-0165 was, at the time of delivery, less than "zero" because the Government not only had to buy a new helicopter to replace the one which burned in Saudi Arabia and had to rebuild the one which crashed at Fort Meade, but also has had to spend millions on investigation and litigation expenses. Thus, to the extent Defendant relies upon the proposition

and Relator are able to prove at trial that the helicopter as delivered by Defendant was valued at zero due to the defective gears, Defendant may be liable for the replacement and repair costs of the helicopters.[52]

Third, as earlier noted, other courts have found that direct, incidental, and maintenance damages are recoverable under the FCA. If the Government and Relator are able to prove at trial that the damage to the CH-47(D) helicopters was as a direct, proximate, and foreseeable result of the false representations made by Boeing to the United States that the helicopters conformed to the contract requirements, those damages may then be found to be recoverable.[53] Moreover, assuming for a moment that the Government and Relator are able to prove their allegations of fact and direct damages to be true, then the issue of consequential damages and its application would not only be inapplicable to the case at bar, but would also no longer act as a bar to "making the government whole."[54]

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that the helicopter, falsely certified as compliant, had "value" when delivered, it is simply mistaken.

(doc. 432).

[52] As the Sixth Circuit stated in *Ekelman*, 532 F.2d at 550 (1976), recoverable damages are those which "naturally and proximately flow from the 'act' of filing a fraudulent claim under the Act." Furthermore, in *Hibbs*, 568 F.2d at 351 (1977), the Third Circuit held that the statute "compels consideration of the element of causation," which is to be "liberally construed so as to provide the government restitution from those whose fraud has caused loss" by considering "the relationship between the unlawful act and the injury ultimately sustained."

[53] *See Ben Grunstein & Sons*, 137 F.Supp. at 210 (1955) (finding that the FCA authorizes damages that are the natural and proximate result of the fraud at issue).

[54] As the Sixth Circuit explained in *Mead Corp. v. McNally-Pittsburg Mfg. Corp.*, 654 F.2d 1197, 1209 n. 17 (6th Cir.1981): "[C]onsequential damages" are those "resulting in the ordinary course of events from the seller's breach". The *Mead* court also recognized that the element of

Fourth, the FCA provides that the United States may recover those damages "which the Government sustains because of the act of" the defendant. 31 U.S.C. § 3729(a) (1999). Of course, this Court recognizes that no physical damage is ever physically and immediately "caused" by the mere "act" of filing a piece of paper. Rather, damage is caused by what that piece of paper causes. So the issue in this case boils down to one of causation, specifically, proximate causation. It is undisputed by either Party and by the relevant case law that the direct causation of damages is recoverable under the Act. Until the Government and Relator are given an opportunity to present their evidence at trial, this Court is unwilling to conclude as a matter of law that they are unable to prove their claims. Defendant moves this Court to summarily adjudicate the exact measure of damages by concluding that at most, Boeing is liable for the price of a fully-conforming transmission gear, as opposed to the replacement and repair value of multi-million dollar helicopters and their related contents that were actually destroyed or damaged in Saudi Arabia and Ft. Meade., Md. Moreover, Defendant ask this Court to conclude on a motion for summary judgment that the Government should not be allowed to present evidence at trial that may indeed prove that the damages at issue in this matter are the direct, proximate, and foreseeable result of the claims submitted by Defendant. This Court finds Defendant's Cross-Motion as to this issue to be premature and inappropriate at this time.

Fifth, in his Reply, Relator confronts Defendant with an interesting rhetorical question: "The question which Boeing did not answer is how is it possible to make the United States whole for the complete loss in Saudi Arabia of

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"proximity" is "inherent in consequential damages." *Id.* The court concluded that Mead's increased labor costs in completing work left undone was not consequential damage, and that such amounts were therefore recoverable by McNally as direct losses. *Id.* at 1209.

Helicopter 89-0165 and all that was aboard it, and the damage to Helicopter 86-1671 at Fort Meade, by paying three times the price of the broken transmission gears" (doc. 432). This Court finds that genuine issues of material fact prevent this Court from answering Relator's question at this time. The question set forth above is precisely why we find that summary judgment is premature and inappropriate as to this issue at this time, and that a trial on the merits is necessary in order to decide which of the Government's and Relator's alleged damages are consequential, and which are direct.

Furthermore, the Court finds that to prematurely preclude the Government and Relator from having an opportunity to prove its alleged damages at a trial on the merits, would not be in the fundamental interest of fairness and justice. We believe that the Government and Relator should be given an opportunity to prove their case on the issue of merit and damages in this matter. If this Court determines at trial that the only damages presented by the Government and Relator are of a consequential nature, then those damages would not be available to the Government and Relator under a FCA theory. However, if the Government and Relator present sufficient evidence that the damages sought are of a direct, proximate, and foreseeable nature, then those damages may be available to the Government and Relator under a FCA theory of recovery. *See Long Island Lighting Co. v. Transamerica Delaval, Inc.*, 646 F.Supp. 1442, 1459 n. 30 (S.D.N.Y.1986) ("We reserve for trial the question of whether the plaintiff's claimed damages should be characterized as direct, incidental, or consequential."); *see also American Elec. Power Co. v. Westinghouse Elec. Corp.*, 418 F.Supp. 435, 459 (S.D.N.Y.1976) ("In general, the precise demarcation between direct and consequential damages is a question of fact").

C. *The Court's Summary*

In conclusion, this Court finds that consequential damages are not recoverable under the False Claims Act. However, we do find that in the Sixth Circuit, direct and incidental damages are recoverable under the False Claims Act. It remains a question of fact to be decided at trial whether the Government's and Relator's allegations and theories of injuries, damages, and recovery are consequential, direct, or incidental in nature. This Court also finds that it would be inappropriate, premature, and against the interest of fairness and justice to decide this issue on a motion for summary judgment. Thus, this Court finds neither Parties' Cross-Motion for Summary Judgment to be persuasive on the issue of the Government's and Relator's actual measure of damages in this matter.

Accordingly, we hereby hold as a matter of law that Defendant's Cross-Motion for Partial Summary Judgment as to the Measure of Damages is hereby GRANTED IN PART for the reasons noted by the Court in Section IV of this Order. In addition, for the reasons set forth above Relator's Cross-Motion for Summary Judgment as to the Measure of Damages (doc. 367) is hereby DENIED.

Furthermore, having reviewed this matter, the Court finds that genuine issues of material fact preclude this Court from finding as a matter of law that the Government is not entitled to the replacement and repair value, as well as the associated costs of the destroyed and damaged helicopters. Therefore, for the reasons set forth above, Defendant's Cross-Motion for Partial Summary Judgment (doc. 340) is not well-taken in regards to this issue, and is therefore DENIED. In addition, for the same reasons set forth above, Relator's Cross-Motion for Summary Judgment (doc. 367) is also DENIED.

CONCLUSION

For the foregoing reasons, Defendant's Cross-Motion for Partial Summary Judgment as to the Measure of Damages (doc. 340) is GRANTED IN PART in relation to the general issue of consequential damages, and DENIED in relation to the issue of preclusion of the Government's replacement and repair helicopter costs. Furthermore, Relator's Cross-Motion for Summary Judgment (doc. 367) as to the Measure of Damages is DENIED.

SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
S.D. OHIO
WESTERN DIVISION

No. C-1-95-375

UNITED STATES OF AMERICA ex rel. BRETT ROBY,
Plaintiff,

v.

THE BOEING COMPANY,
Defendant.

Filed Nov. 2, 1999

ORDER

SPIEGEL, Senior District Judge.

This matter is before the Court on the Government's Motion for Partial Summary Judgment as to Defendant's Third Affirmative Defense Re: The High Value Items Clause (hereinafter, "the Government's Motion for Partial Summary Judgment") (doc. 296); Defendant's Memorandum in Opposition to the Government's Motion for Partial Summary Judgment (hereinafter, "Defendant's Response") (doc. 340); Government's and Relator's Joint Reply in Support of its Motion for Partial Summary Judgment (hereinafter, "Plaintiffs' Joint Reply") (doc. 366); Aerospace Industries of America, Inc.'s Motion for Leave to Participate as *Amicus Curiae* (hereinafter, "Aerospace's *Amicus Curiae* Motion") (doc. 402); Government's Opposition to Aerospace's *Amicus Curiae* Motion (doc. 417); Relator's Opposition to Aerospace's *Amicus Curiae* Motion (doc. 422); Aerospace's Reply to the

Government's and Relator's Opposition Memoranda (doc. 428); and Defendant's Reply to the Government's and Relator's Opposition Memoranda (doc. 429).

BACKGROUND

On May 22, 1995, Relator Brett Roby (hereinafter, "Relator") filed this action under seal pursuant to Title 31 U.S.C. § 3730(b) on behalf of himself and the United States Government (hereinafter, "the Government") in the United States District Court for the Southern District of Ohio (doc. 2). Relator alleges that The Boeing Company (hereinafter, "Boeing" or "Defendant") and its supplier, The Speco Corporation (hereinafter, "Speco"),[1] violated the False Claims Act, Title 31 U.S.C. § 3729 *et seq.*, by manufacturing and selling defective transmission gears to the Government via Boeing's CH-47(D) Chinook Army helicopters (hereinafter, "CH-47-(D) helicopters") (*Id.*). On April 30, 1997, the Government intervened and filed an Amended Complaint (doc. 34) against Boeing. In the Amended Complaint, the Government alleges that Speco manufactured defective gears at its Springfield, Ohio facility before Boeing installed the gears in the CH-47(D) helicopters and provided them to the United States Army (*Id.*). The Amended Complaint was unsealed on May 1, 1997.

Government and Relator allege in Count I of the Amended Complaint that Defendant submitted false claims under Title 31 U.S.C. § 3729-3133, as amended by Pub.L. 99-562, 100 Stat. 3153 (1986) (doc. 34). Specifically, the Government contends that one of the Speco-made gears failed in 1991, leading to the total loss of a CH-47(D) helicopter and all of its contents, at an estimated loss of approximately $10 Million (*Id.*). In addition, the Government alleges that in 1993 a

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[1] Although an original party to this action, Speco filed for bankruptcy and later settled this action with the United States and Relator in the United States Bankruptcy Court.

Speco-made gear failed in another helicopter resulting in a hard landing near Ft. Meade, Maryland, causing approximately $1 million in damage to the helicopter (*Id.*). The Government contends that "[b]y virtue of the acts described above, Boeing, by and through its officers, agents, and employees, knowingly submitted, and caused to be submitted, false or fraudulent claims for payment or approval to [its] officers, employees, or agents of the United States Government" (*Id.*). The Government concludes Count I with the contention that "[b]y reason of these payments made upon these false claims, the United States Government has been damaged as a result of Defendant's violations of the False Claims Act, arising under [Title] 31 U.S.C. §§ 3729(a)(1), (2), (3) & (7), for damages to be determined at trial . . ." (*Id.*).

The Amended Complaint further asserts claims against Defendant for: (1) payment by mistake, (2) unjust enrichment, (3) breach of contract, and (4) common law fraud (Id.). The Government seeks to recover treble damages based on the value of the first CH-47(D) helicopter and its contents, for the cost of repairing the second aircraft, and to treble those damages under the False Claims Act (*Id.*). In addition, the Government asserts that it is entitled to treble damages for the delivery of other U.S. Army Chinook helicopters that Speco allegedly manufactured with non-conforming engine transmission gears from 1987 to 1995, and statutory penalties of $5,0000 to $10,000 for the submission of each purportedly false claim for the helicopters in question (*Id.*).

In its Answer, Defendant submits a general denial of the Government's allegations of false claims, violations of the False Claims Act, and the resulting compensatory and statutory damages (doc. 161). Defendant defends by asserting a total of twelve (12) affirmative defenses that would individually or collectively relieve Defendant of all liability from

the Government's claims (*Id.*).[2] Specifically, Defendant's Third Affirmative Defense states that the "damages sought by the [G]overnment are barred by its inclusion of the High Value Items Clause in the prime contract with Boeing" (*Id.*).

On December 12, 1998, the Government filed a Motion for Partial Summary Judgment (doc. 296) challenging Defendant's assertion of the High-Value Items Clause as an affirmative defense. Thereafter, Defendant filed a Response (doc. 340) and Government and Relator followed with a Joint Reply (doc. 366). This Court heard oral arguments on the Government's Motion on June 2, 1999 (doc. 441). On May 7, 1999, Aerospace Industries Association of America, Inc filed its Motion for Leave to Participate as *Amicus Curiae* (doc. 402). Shortly thereafter, the Government and Relator filed separate Motions in Opposition Memoranda (docs. 417 & 422); and followed by Aerospace's and Defendant's Reply briefs (docs. 429 & 429).

The Court believes it is important to note that, even though the Parties included discussions on the issues of the appropriateness and measure of consequential damages in their respective pleadings, this Order will only address the primary issue of the applicability of Defendant's Third Affirmative Defense in regards to the False Claims Act. Furthermore, any issues concerning the merits of the Government's and Relator's claims, or of Defendant's eleven (11) other affirmative defenses will not be addressed by the Court in this Order.

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[2] Boeing alleges the following affirmative defenses to the allegations set forth in the Amended Complaint: (1) failure to state a claim upon which relief can be granted; (2) the fraud cause of action is time-barred; (3) the damages sought are barred by the High-Value Items Clause; (4) estoppel due to the High-Value Items Clause; (5) consequential damages are not available; (6) no injury; (7) failure to plead fraud with particularity; (8) laches; (9) express contract; (10) special damages are not plead with specificity; (11) punitive damages are not plead with particularity; and (12) equitable estoppel (doc. 161).

STANDARD OF REVIEW

The narrow question that we must decide on a motion for summary judgment is whether there exists a "genuine issue as to any material fact and [whether] the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The Supreme Court elaborated upon the appropriate standard in deciding a motion for summary judgment as follows:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The moving party has the initial burden of showing the absence of a genuine issue of material fact as to an essential element of the non-movant's case. Id. at 321, 106 S.Ct. 2548; *Guarino v. Brookfield Township Trustees*, 980 F.2d 399, 405 (6th Cir.1992); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir.1989). If the moving party meets this burden, then the non-moving party "must set forth specific facts showing there is a genuine issue for trial." Fed.R.Civ.P. 56(e); *see Guarino*, 980 F.2d at 405.

As the Supreme Court stated in *Celotex*, the non-moving party must "designate" specific facts showing there is a genuine issue for trial. *Celotex*, 477 U.S. at 324, 106 S.Ct. 2548; *Guarino*, 980 F.2d at 405. Although the burden might not require the non-moving party to "designate" facts by citing page numbers, "'the designated portions must be presented with enough specificity that the district court can readily identify the facts upon which the non-moving party

relies.'" *Guarino*, 980 F.2d at 405 (quoting *InterRoyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir.1989), *cert. denied*, 494 U.S. 1091, 110 S.Ct. 1839, 108 L.Ed.2d 967 (1990)).

Summary judgment is not appropriate if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Conclusory allegations, however, are not sufficient to defeat a motion for summary judgment. *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1162 (6th Cir.1990).

DISCUSSION

I. *Aerospace's Amicus Curiae Motion*

In relation to Aerospace's *Amicus Curiae* Motion (doc. 402), we note that Local Rule 7.2 sets forth the guidelines for the submission of memoranda filed with this Court. Aerospace asserts in its Motion that "a district court has discretion to grant *amicus curiae* status to a party for the purpose of providing such party the opportunity to present views on the issues before the Court, when such party has an important interest and a valuable perspective on the issues presented in this case" (*Id.*). *See, e.g., Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir.1997); *United States v. State of Michigan*, 940 F.2d 143, 146 (6th Cir.1991); *United States v. State of Michigan*, 680 F.Supp. 928, 943 (W.D.Mich.1987).

In the Government's and Relator's Opposition to Aerospace's *Amicus Curiae* Motion (docs. 417 & 422), they allege that Aerospace's Motion is untimely, improper, and not useful to this Court in deciding this matter. *See United States v. Michigan*, 940 F.2d at 165 ("[P]articipation as an *amicus* to brief and argue as a friend of the court was, and continues to be, a privilege within the sound discretion of the court"). Moreover, the Government and Relator assert that Aerospace

and Defendant are attempting to file a *sur reply* disguised as an *amicus curiae* brief in violation of the Local Rule's "good cause" requirement. *See* S.D. Ohio Civ. R. 7.2(a)(2).

In contrast, Aerospace's Reply contends that its Motion for *Amicus* was "filed at an appropriate time during the proceedings, while the parties were in the midst of briefing cross motions for partial summary judgment, and was therefore timely" (doc. 428). *See Fluor Corp. v. United States*, 35 Fed. Cl. 284, 286 (1996) (finding that the filing of an *amicus* brief in the midst of cross motions for summary judgment was timely). Furthermore, Aerospace contends that its "*amicus* brief brings to the Court's attention considerations that are germane to the Court's decision[;] [Aerospace's] brief is helpful and necessary to the Court's resolution of the issues presented in this case" (*Id.*). *See Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir.1997) (holding that an *amicus* brief should be allowed when the *amicus* has unique information or perspective that can help the court beyond that the lawyers or the parties are able to provide).

After reviewing this matter, this Court finds that Aerospace has an important interest and a valuable perspective that is helpful to the Court on the issues presented in this case. In addition, we find Aerospace's *Amicus Curiae* Motion to be in compliance with the guidelines set forth in Local Rule 7.2(a)(1) for the submission of memoranda filed with this Court, and, thus, no further showing of "good cause" is required of Aerospace. *See* S.D. Ohio Civ. R. 7.2(a)(2).

Accordingly, pursuant to Local Rule 7.2, the Court finds Aerospace's Motion to be well-taken, and, thus, we hereby GRANT Aerospace's Motion for an Appearance as *Amicus Curiae* (doc. 402) in this action.

II. *The Parties Arguments*

In the Government's Motion for Partial Summary Judgment (doc. 296), the Government seeks summary judgment as a matter of law as to the Third Affirmative Defense asserted by Defendant. The Third Affirmative Defense is brought on the grounds that the High-Value Items Clause [3] (hereinafter, the "HVIC"), set forth in Title 48 of the Code of Federal Regulations ("C.F.R."), § 46.800 *et seq.* (1999), and incorporated into the contracts between the Government and Boeing, allegedly provides no defense to the Government's claims against Defendant for violations of the False Claims Act (hereinafter, the "FCA") or common-law doctrines, such as fraud and unjust enrichment.[4] The Government asserts that it is not arguing that the HVIC is void and without effect. Rather, the Government argues, "its legal effect may be to limit Boeing's liability to lessen damages in a breach of contract action for any loss, destruction, or damage to the [G]overnment's property in situations where there is no proof of 'willful misconduct' or 'lack of good faith' by Boeing's 'managerial personnel'" (*Id.*). *See* 48 C.F.R. § 46.803(d)(2) (1999). Nonetheless, the Government reasserts that the HVIC

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[3] *See* Title 48 C.F.R. § 52.246-24 (1999) "Limitation of Liability—High-Value Items."

[4] Moreover, the Government contends in its Motion that while the HVIC may be applicable to its breach of contract claim against Defendant, it also believes there may be sufficient evidence of a "'lack of good faith' by Boeing's managerial personnel" in order for Boeing to attempt to bring this case within an exception to the HVIC. *See* 48 C.F.R. § 46.803(d)(2) (1999). Nonetheless, the Government submits that whether there exists such evidence is irrelevant to this Motion. Additionally, the Government alleges that it has reason to believe that Defendant has insurance coverage which renders the HVIC *per se* inapplicable. *See* 48 C.F.R. § 46.803 (d)(3) (1999).

Note: The issue of whether or not Boeing is actually insured for this loss will not be addressed in this Order.

cannot be construed to preclude liability, limit damages, or be permitted to "engraft additional elements or requirements on to an Act of Congress, such as the FCA" (*Id.*).

In its Response, Defendant alleges that, pursuant to the HVIC, the Government agreed to hold Boeing harmless for the loss or damage to high-value government property, including any defects or deficiencies that may have been present in the CH-47(D) helicopters that Boeing delivered under the primary military contract (doc. 340). The HVIC, Defendant submits, bars the Government from seeking compensation for any loss or damage to the two helicopters under any of the claims asserted. Defendant sets forth several points as to why its Third Affirmative Defense should act as a bar to the Government's and Relator's FCA, fraud, and common law claims.

First, Defendant asserts that, as required by the Federal Acquisition Regulations (hereinafter, "F.A.R."),[5] the HVIC [6] is included in every military procurement contract for high-value items at the behest of, and for the benefit of, the Government. *See* 48 C.F.R. § 46.805(a)(2) (1999). Were it not for this Clause, Defendant contends that contractors (such as Boeing) would be forced to purchase extremely expensive liability insurance, the cost of which would be borne by the Government pursuant to established contract cost principles. *See* 48 C.F.R. § 31.205-19 (1999). Defendant writes "[t]herefore, in order to reduce significantly the cost of major defense systems and equipment, the Armed Services have a long-standing practice—in existence since World War II and

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[5] The Federal Acquisition Regulations are codified in Title 48 of the Code Of Federal Regulations ("C.F.R.") and are usually found under the same or similar section numbers.

[6] *See* 48 C.F.R. § 52.246-24 (1999).

formally embodied in the FAR or its precursor since 1971—of self-insuring for damages to high-value items such as military aircraft" [7] (doc. 340).

Second, Defendant alleges that, on its face, the HVIC prohibits recovery for the claimed damages. Defendant further contends that the warranty clauses in the procurement contract limits its liability for defective components to the cost of "repair or replacement of the warranted primary or secondary component which originally failed" (doc. 340, Exs. 3 & 4). In particular, Defendant quotes the pertinent terms of the contract that allegedly bolsters its assertions that the HVIC bars the Government's claims. Defendant submits that the military procurement contract states, in pertinent part, that:

> [R]esultant damage from the failure [of a warranted part] does not include damage to Contractor-warranted components/parts which result from hard landing, crash impact, fire and/or explosion, although the cause of such occurrences may be traced in whole or in part to failure of a warranted component/part.

(doc. 240, Exs. 4 & 5).

Third, Defendant further submits in its Response that the HVIC was intended to preclude claims for damage to high-value items, regardless of the Government's cause of action or theory of recovery. *See Australia v. Lockheed Aircraft Corp. & Menasco Mfg. Co.*, Civ. No. 69-1623-WPG (C.D.Cal. Jan. 10, 1972)[8] (hereinafter, "*Menasco*") (doc. 340,

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[7] "'High-value item' means a contract end item that (a) has a high unit cost (normally exceeding $100,000 per unit), such as an aircraft, an aircraft engine, a communications system, a computer system, a missile, or a ship, and (b) is designated by the contracting officer as a high-value item." 48 C.F.R. § 46.802 (1999).

[8] Based on the record before it, the district court in *Menasco* found that it was:

> [T]he practice of the United States Navy not to make damage claims against the manufacturers of military aircraft that it purchased for its

Ex. 5); *see also* 4 United States Commission On Government Procurement, *Report of the Commission on Government Procurement* 87, 91-93 (1972) (hereinafter, "*Comm'n Report*") (doc. 340, Ex. 6).[9] Thus, Defendant asserts that the reference to "contractual relief" in 48 C.F.R. § 46.803(c) is not simply relief from contractual claims (i.e., breach of contract), but is also relief from the damages arising out of the purchase or use of the goods delivered. *See In re Gulf & Midlands Barge Line, Inc.*, 509 F.2d 713, 719 (5th Cir.1975) (finding that the phrase "any peril" in the insurance policy of the National Aeronautics & Space Administration also included acts of negligence by the tug boat's crew).

Defendant also argues in its Response that precedent establishes that the "assumption-of-risk" clauses found in the procurement contracts may circumscribe the availability of damages under the FCA and other causes of action. Defendant submits that the case of *United States v. United States Cartridge Co.*, 198 F.2d 456 (8th Cir.1952), is directly on point with what the law and holding should be in this matter.

> own use, in the event of the loss of such aircraft. This practice was followed irrespective of any conclusion that the Navy might hold with respect to such matters as negligence or breach of warranty on the part of the manufacturer.

Id. at 2; *see also* doc. 340, Ex. 5.

[9] The Commission on Government Procurement similarly reported that prior to *Menasco*, defense contractors "universally" understood that the general practice of the government in military contracting was to accept risk for loss or damage except for the warranted item that was defective. The Report went on to state that:

> The history of the government's pursuit of claims for lost or damaged property supports the industry understanding of the unwritten policy of self-insurance. Except for nominal repairs and replacements, there is little precedent in the courts, boards of contract appeals, or the General Accounting Office on claims against contractors . . . for recovery of such damages.

Comm'n Report, at 92; *see also* doc. 340, Ex. 6.

In *United States Cartridge*, the court barred the government from bringing a FCA action because the government had agreed to limit the contractor's liability for damages, including those arising from fraud. *Id.* at 465. According to Defendant, the Eighth Circuit found that the Secretary of War had the statutory authority to enter into contracts in order to "allocate the risks and obligations which were to be assumed by the [contractor] and those which were to be borne by the government; [and] was authorized to limit the defendant's risks in that regard to whatever extent he deemed necessary in order to secure [the contractor's services]." *Id.* Defendant submits that, even if the Court finds that the High-Value Items Clause and the FCA are in conflict with each other, then the Government is nonetheless bound by its prior promises under the HVIC.

The Government and Relator (hereinafter, "Plaintiffs") submitted a Joint Reply (doc. 366) in support of the Plaintiffs' Motion for Partial Summary Judgment (doc. 296). Plaintiffs assert that the HVIC does not and cannot in any way limit the damages available under the FCA or modify the definition of "knowing" as set forth in the FCA (doc. 366). Plaintiffs also set forth several points in order to dispute the arguments presented by Defendant in its Response.

First, Plaintiffs contend that the HVIC is itself silent as to the FCA and common-law fraud claims, and the F.A.R. limits its application to "contractual remedies." *See* 48 C.F.R. §§ 46.803 & 52.246-24 (1999). Plaintiffs further assert that the complete silence in the HVIC, coupled with 48 C.F.R. § 46.803, demonstrates that the Department of Defense (hereinafter, the "DOD") intended that the HVIC be limited to contractual claims only. Plaintiffs distinguish the *Menasco* case from the instant matter by noting that, in *Menasco*, there was no evidence that the government of Australia ever advanced any claims relating to a FCA violation or common law fraud against either the prime contractor or the

subcontractor that manufactured the failed landing gear. Instead, Plaintiffs insist that *Menasco* focused on products liability and negligence claims. *See Menasco*, Civ. No. 69-1623-WPG, at 2.

Second, Plaintiffs aver that liability and damages under the FCA does not arise from the defective nature of the products supplied but from a defendant's false statements and false claims concerning those products. *See United States ex rel. Compton v. Midwest Specialties, Inc.*, 142 F.3d 296, 301-02 (6th Cir.1998) (finding that liability under the FCA arose from false representations of a party that brake-shoe kits conformed to the terms of the contract). Moreover, Plaintiffs submit that when 48 C.F.R. §§ 46.803(a)-(d) are read together, it is clear that the Government does not act as a self-insurer as to contractual liability for the loss or damage to high-value items when the defects are the result of "willful misconduct" or a "lack of good faith" on the part of the contractor's management personnel (doc. 366). Those same public policy arguments should also apply to protect the Government from the fraudulent claims of contractors as well.

Third, Plaintiffs contend that to read the HVIC as Defendant suggests would improperly allow a regulation to supersede or modify a statute. *See, e.g., Robbins v. Bentsen*, 41 F.3d 1195, 1198 (7th Cir.1994) ("Regulations cannot trump the plain language of the statutes, and we will not read the two to conflict where such a reading is unnecessary.").[10]

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[10] *See also Burnside-Ott Aviation Training Center v. Dalton*, 107 F.3d 854, 858-59 (Fed.Cir.1997) ("Generally, a provision in a government contract that violates or conflicts with a federal statute is invalid or void.") (quoting *American Airlines, Inc. v. Austin*, 75 F.3d 1535, 1538 (Fed.Cir.1996)); *Urban Data Sys., Inc. v. United States*, 699 F.2d 1147, 1151 (Fed.Cir.1983) (holding that price adjustment clauses that violate a federal statute are invalid or void); *Yosemite Park v. United States*, 217

Plaintiffs argue that "[t]o adopt Defendant's argument would require the DOD to do by contract that which it cannot do under statute—resolve FCA and fraud claims" (doc. 366).

Moreover, Plaintiffs allege that Defendant's attempt to characterize *United States Cartridge* as a case that is on point with the issues at bar is inaccurate and "misleading" (doc. 366). Plaintiffs submit that *United States Cartridge* should be viewed as a case decided under a long-superseded version of the War Powers Act that had as its underlying theme the exigencies of the then-imminent World War II (*Id.*). *See United States Cartridge*, 198 F.2d at 463.[11] Plaintiffs conclude this point by stating that:

> Thus, despite Boeing's claims that *United States Cartridge* is directly on point with the instant case, it is clear that in the remanufactured contracts, which were not issued under the War Powers Act, not the product of a 'state of emergency,' and not subject to the unique manufacturing and labor issues of pre-World War II. [T]he contracting officer had no authority to waive or limit the United States claims against Boeing for its own fraud and violations of the FCA.

(doc. 366). Thus, Plaintiffs argue, there are no genuine issues of material fact that prevent this Court from finding in favor of the Government as a matter of law.

Ct.Cl. 360, 582 F.2d 552, 558 (1978) (finding that a provision in the contract that violated a federal procurement law was an unenforceable portion of that contract).

[11] Plaintiffs further distinguish *United States Cartridge* by asserting that to compare the emergency situations during the World War II era with the limited monitoring accomplished by Government inspectors would also be "misleading." "The inclusion of an inspection clause in a contract does not modify the prime contractor's responsibility to supervise its subcontractors and does not make the Government the *de facto* manager of the facility," as was the case in *United States Cartridge* (doc. 366).

Nonetheless, in its *Amicus Curiae* Motion, Aerospace asserts that the High-Value Items Clause provides that the Government will self-insure for the loss caused by any damage to high-value items regardless of how the Government's damages are characterized (doc. 402). Moreover, Aerospace alleges that it, and its member companies, have conducted business with the Government in reliance on this common understanding of the HVIC (*Id.*). Aerospace contends that it has detrimentally relied on the HVIC, and, therefore, "[a]ny inconsistency between the policy language set forth in F.A.R. Part 46 and the High-Value Items Clause must be resolved in favor of the contract provision, which limits the Government's ability to recover for the loss of high-value items under the False Claims Act" (*Id.*). Furthermore, Aerospace argues that "[t]he Government's assertion that it can simply abrogate the contractual protections it has conferred upon its contractors by invoking a statute like the FCA and contending that the statute 'trumps' a valid and enforceable contract provision is equally unsupportable" (*Id.*).

After reviewing the Parties' briefs, exhibits, and evidence and after considering the oral arguments presented at the June 2, 1999 hearing, the Court concludes that there are no genuine issues of material fact that preclude a grant of summary judgment as to the Government's Motion for Partial Summary Judgment. Therefore, for the following reasons, this Court finds the Government's and Relator's arguments to be persuasive and well-taken. Accordingly, we hereby hold as a matter of law that Defendant Boeing's Third Affirmative Defense that was being asserted against the FCA claims brought by the Government and Relator is hereby DISMISSED for the reasons noted by the Court in Section V of this Order.

III. *The False Claims Act*

A. *The "Qui Tam" Provisions of the FCA* [12]

The FCA, which Congress originally enacted in 1863, is the "government's primary litigative tool for combating fraud" against the federal government. S.Rep. No. 99-345, at 2 (1986). The Act authorizes both the Attorney General and private persons to bring civil actions to enforce the Act. Title 31 U.S.C. § 3730. Congress amended the FCA in 1986 to increase the financial and other incentives for private individuals to bring suits under the Act in the hopes of enlisting the aid of the citizenry in combating the rising problem of "sophisticated and widespread fraud." S.Rep. No. 99-345, at 2, 23-24 (1986).

Section 3730(b) of the FCA as now constituted provides that a person may bring a civil action for a violation of the substantive provisions of the Act "for the person and for the United States Government." 31 U.S.C. § 3730(b)(1). The action must be brought in the name of the government. An action under this provision is termed a "*qui tam*" [13] suit, and the person who brings such an action is referred to as a "relator" or "informer." *Id.* If the government files an action to enforce the FCA, a would-be relator may not later bring an

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[12] The following summary of the history of the FCA was compiled in its entirety by a review of the Congressional Record and from the relevant portions of the Seventh Circuit's decision in *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 745-46 (9th Cir.1993) (holding that a former employee of a government contractor who brought an action against the contractor under the *qui tam* provisions of the FCA met the Article III standing requirements, and did not violate the Due Process Clause of the U.S. Constitution).

[13] The term "*qui tam*" is short for "*qui tam pro domino rege quam pro se imposo sequitur*," which is interpreted as "he who brings the action as well for the king as for himself." *Bass Anglers Sportsman's Soc'y of America v. U.S. Plywood-Champion Papers, Inc.*, 324 F.Supp. 302, 305 (S.D.Tex.1971).

action based on the same underlying facts. *Id.* § 3730(e)(3). Nor may a private party litigate a *qui tam* suit based upon the public findings of a government investigation or on disclosures made in the news media, unless that party is an original and independent source of the information on which the complaint is based. *Id.* § 3730(e)(4)(A)-(B).

Upon bringing a *qui tam* action, a relator must serve on the government a copy of the complaint and written disclosures of substantially all material evidence and information the relator possesses. The complaint must be filed *in camera* and remain under seal for at least sixty (60) days so that the government may investigate the relator's allegations; though upon a showing of "good cause," the government may move the court for an extension of the sixty (60) day period. *Id.* § 3730(b)(2), (3). By the end of the period provided for the government to complete its investigation, the government must decide whether to intervene and proceed with the action, "in which case the action shall be conducted by the government;"[14] or whether to decline to take over the action, "in which case the person bringing the action shall have the right to conduct the action." *Id.* § 3730(b)(4)(B).

The original version of the FCA allowed anyone to bring a *qui tam* action and receive up to fifty percent (50%) of the amount recovered. S.Rep. No. 99-345, at 8-10 (1986). This broad provision led to abuse and in 1943, following the Supreme Court's decision in *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 546-47, 63 S.Ct. 379, 87 L.Ed. 443 (1943),[15] Congress amended the statute. The 1943 version of the FCA precluded actions "based on evidence or information

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[14] *Id.* § 3730(b)(4)(A).

[15] In *United States ex rel. Marcus*, the Supreme Court held that a relator could bring a *qui tam* action even though the action was based entirely upon information contained in the government indictment. *Id.*, 317 U.S. at 546-47, 63 S.Ct. 379.

the Government had when the action was brought." *United States ex rel. Stinson v. Prudential Ins.*, 944 F.2d 1149, 1153 (3d Cir.1991). This led to claims being barred even in cases where the *qui tam* supplied the information to the government before filing the claim. *See United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100, 1106-07 (7th Cir.1984).[16]

In 1986, Congress again amended the FCA in order "to encourage any individual knowing of governmental fraud to bring that information forward." S.Rep. No. 99-345, at 2 (1986). According to the Third Circuit, "[t]o revitalize the *qui tam* provisions, the amendment provided incentives for private enforcement, including increased monetary awards, adopted a lower burden of proof, and allowed a *qui tam* to remain a party in the action even if the government intervenes." *Stinson*, 944 F.2d at 1154.

B. *Damages Under The FCA*

The FCA itself does not specify how to quantify damages, but states instead that the government should be awarded damages that it "sustains because of" the contractor's fraudulent acts. 31 U.S.C. § 3729(a). Damages under the FCA are intended to "provide for restitution to the government of money taken from it by fraud. . . ."[17] *United States ex rel. Marcus*, 317 U.S. at 551, 63 S.Ct. 379. Trebling the damages

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[16] The holding in *United States ex rel. Wisconsin*, was subsequently superseded by statute in a number of states (including Illinois, California, Maryland, Oklahoma, Virginia, Wisconsin, and Vermont).

[17] The government is entitled to recover forfeitures even without proof of any damages or proof that payment was made on the claims. *See* S.Rep. No. 345, at 8 (1986); *see also United States v. McLeod*, 721 F.2d 282, 285 (9th Cir.1983) (The "damages provision of the False Claims Act is meant not only to compensate the government fully but also to deter fraudulent claims from being filed against it.").

and imposing penalties "were chosen to make sure that the government would be made completely whole." *Id.* at 551-52, 63 S.Ct. 379.

Because each case under the FCA involves unique types of damages to the government, a formula for calculating damages must be created for each case that will provide the government with the damages directly caused by the filing of a false claim. *BMY—Combat Sys. Div. of Harsco Corp. v. United States*, No. 90-252 C, 1999 WL 456960, at *7, 44 Fed. Cl. 141 (July 7, 1999). As the Ninth Circuit stated, "[o]rdinarily the measure of the government's damages would be the amount that it paid out by reason of the false [claims] over and above what it would have paid if the claims had been truthful." *United States v. Woodbury*, 359 F.2d 370, 379 (9th Cir.1966).

Courts utilize several methods of calculation intended to ensure that the government receives "the benefit of its bargain," being careful not to award consequential damages. *See BMY—Combat Sys.*, 1999 WL 456960, at *7 (citing *United States v. Aerodex, Inc.*, 469 F.2d 1003, 1011 (5th Cir.1972)) ("[T]he language of the False Claims Act does not include consequential damages resulting from delivery of defective goods."). Although the *Aerodex* court firmly rejected consequential damages, the Sixth Circuit has awarded "repair" expenses to the government in a similar case. *See United States v. Ekelman & Assocs., Inc.*, 532 F.2d 545, 547-551 (6th Cir.1976) (finding that the government should be awarded not only its losses due to the defendant's loan default, but also its maintenance and repair costs after foreclosure).

C. *FCA Case Law Applied*

As amended in 1986, the False Claims Act provides that the terms "'knowing and knowingly' mean that a person, with respect to information: (1) has actual knowledge of the

information, (2) acts in deliberate ignorance of the truth or falsity of the information, or (3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required." 31 U.S.C. § 3729(b).

The archetypal *qui tam* action is filed by an insider at a private company who discovers his employer has over-charged for services or supplies under a government contract. *See, e.g., United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953, 968-69 (9th Cir.1995) (holding that a former employee of a federal contractor, who had signed a release of all claims against contractor in settlement of earlier litigation, brought *qui tam* action against contractor under FCA and was allowed to sue contractor). However, FCA actions have also been sustained under theories of supplying substandard products or services;[18] false negotiation, including bid rigging and defective pricing;[19] and false certification.[20] *See United States ex rel. Compton*, 142 F.3d at 303-04.

In *United States v. Bornstein*, 423 U.S. 303, 311, 96 S.Ct. 523, 46 L.Ed.2d 514 (1976), the Supreme Court interpreted the FCA to differentiate contracts from claims[21] submitted under contracts, holding that only the latter gave rise to liability under the FCA. The Court held that the defendant is

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[18] *See Aerodex*, 469 F.2d at 1003.

[19] *See United States v. Ehrlich*, 643 F.2d 634 (9th Cir.1981).

[20] *See United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir.1996).

[21] The term "claim" is defined in 31 U.S.C. § 3729(c) of the False Claims Act and provides, in pertinent part, that:

> For purposes of this section, 'claim' includes any request or demand, whether under a contract or otherwise, for money or property, which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

liable under the statute because he engaged in conduct that caused the false claims to be submitted to the United States, and the Court explained that:

> While it is true that no false claims would have been submitted had [the defendant] and [its prime contractor] not entered into a contractual relationship, the entry into that relationship did not in itself cause the submission of any false claims . . . The language of the statute focuses on false claims, not on contracts.

Id. at 311, 96 S.Ct. 523 (discussing *United States ex rel. Marcus*, 317 U.S. at 552, 63 S.Ct. 379). Similarly, in *United States v. Ueber*, 299 F.2d 310, 313 (6th Cir.1962), the Sixth Circuit held that a cause of action under the FCA did not arise "until the first voucher seeking payment of the false claims was presented to the United States." *See also Ekelman & Assocs.*, 532 F.2d at 551-52 (stating that "no cause of action arises . . . until the [defendant] presents a claim to the [government] for payment . . ."). In another case, the Sixth Circuit explained that if the "government [is] seeking to state a claim under the FCA [it] must allege a false claim for payment made upon the government, not merely a fraudulent contract." *Kaminski v. Teledyne Industries, Inc.*, No. 96-3621, 1997 WL 415314, at *4 (6th Cir. July 21, 1997).

D. *Threshold Issue*.

Neither the Government nor Relator cites to a single case in which the Government was able to recover under the FCA for damages that would otherwise be excluded by the HVIC. Similarly, the only case cited by Defendant that allegedly stands for the proposition that a contractor could successfully defend against a governmental-entity using a limited liability provision is *United States v. United States Cartridge Co.* However, *United States Cartridge* did not directly involve the HVIC (which was not promulgated until 1971), nor did it

involve a modern version of the FCA. In fact, after a comprehensive case law search of all of the federal districts in the United States, this Court has been unable to locate any case on point with the facts and issues presented by the Parties in the instant matter. Indeed, even Defendant concedes that, as far as it is aware, "this litigation marks the first time that the [G]overnment has brought suit to recover damages under the FCA that would be [otherwise] disallowed by the High-Value Items Clause" (doc. 340). As stated above, the pleadings of Plaintiffs [22] and Defendant [23] offer several opposing theories, rationales, and defenses as to whether the HVIC is, or is not, a valid defense to the Government's claims under the FCA.

Since the Court is satisfied that the Parties are correct in that this action is a case of first impression in the federal courts of the United States, the threshold issue in this matter is "Whether the High-Value Items Clause is applicable or acts as a valid affirmative defense to claims filed under the False Claims Act, Title 31 U.S.C. §§ 3729-3733."

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[22] Some examples of the Plaintiffs' theories as to why the HVIC is not a valid affirmative defense to its claims under the FCA are that: (1) the plain language of the HVIC applies only to contractual remedies; (2) a regulation such as the HVIC cannot abrogate or limit a statute enacted by Congress, such as the FCA; and (3) only the Attorney General of the United States can compromise a claim under the FCA (doc. 296).

[23] Some examples of Defendant's theories as to why the HVIC acts as a complete defense to Plaintiffs' claims under the FCA are that: (1) the HVIC prohibits recovery for the claimed damages; (2) the HVIC was intended to preclude these damages, regardless of the Government's cause of action or theory of recovery; and (3) the Government's express "assumption of risk" through a contract clause is enforceable, and is fully compatible with the Attorney General's authority to conduct litigation (doc. 340).

IV. *The High-Value Items Clause* [24]

A. *"The Clause"*

Military procurement contracts with the DOD generally include certain limitations of contractual liability, which are provided for in the Federal Acquisition Regulations and are subsequently codified in the Code of Federal Regulations. One of these provisions, known as the High-Value Items Clause, provides a "limit[ation] of contractor liability for loss or damages to the property of the Government that (a) occurs after acceptance,[25] and (b) results from defects or deficiencies in the supplies delivered or the services performed." 48 C.F.R. § 46.800 (1999). The military procurement contracts for providing the CH-47(D) helicopters to the Army included the HVIC, which states, in pertinent part, that:

> (a) Except as provided in paragraphs (b) through (e) below, and notwithstanding any other provision of this contract, the Contractor shall not be liable for loss of or damage to property of the Government (including the supplies delivered under this contract) that (1) occurs after the Government's acceptance of the supplies delivered under this contract, and (2) results from, any defects or deficiencies in the supplies.
>
> (b) The limitation of liability under paragraph (a) above shall not apply when a defect or deficiency in, or the Government's acceptance of, the supplies results from the willful misconduct or lack of good faith on the part of any of the Contractor's managerial personnel. The term "Contractor's managerial personnel," as used in this clause, means the Contractor's director's, officers, and any of the Contractor's managers, superintendents, or equivalent representatives . . .

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[24] *See* 48 C.F.R. § 52.246-24 (1999).

[25] For purposes of this Motion, the Government has conceded that "acceptance" has occurred (*see* doc. 296).

> (c) If the Contractor carries insurance, or has established a reserve for self-insurance, covering liability for loss or damage suffered by the Government through the purchase or use of the supplies required to be delivered under this contract, the Contractor shall be liable to the Government, to the extent of such insurance or reserve, for the loss of or damage to property of the Government occurring after the Government's acceptance of, and resulting from any defects or deficiencies in, the supplies delivered under this contract.
>
> (d)(1) This clause does not diminish the Contractor's obligations, to the extent that they arise otherwise under this contract, relating to correction, repair, replacement, or other relief for any defect or deficiency in supplies delivered under this contract . . . .

48 C.F.R. § 52.246-24(a)-(d) (1999).

B. *Historical Background*

The HVIC embodies a long-standing practice of the DOD to self-insure for damage to high-value items. This practice was put in writing in 1971 following the loss of a military aircraft, purportedly as a result of a defective landing gear, that had been purchased by the U.S. Navy and resold to the Australian Navy (doc. 340, Ex. 5). *See Menasco*, Civ. No. 69-1623-WPG, at 2. The Government of Australia sued the manufacturer and its subcontractor, seeking tort, contract, and products liability damages for the loss of the aircraft. *Id.* at 2; *see also Comm'n Report* at 91-93 (*see* doc. 340, Ex. 6). Based on the record before it, the district court in *Menasco* found that it was:

> [T]he practice of the United States Navy not to make damage claims against the manufacturers of military aircraft that it purchased for its own use, in the event of [the] loss of such aircraft. This practice was followed

> irrespective of any conclusion that the Navy might hold with respect to such matters as negligence or breach of warranty on the part of the manufacturer.

Menasco, Civ. No. 69-1623-WPG, at 2. The court further found that this practice had two principal purposes: (a) to encourage the manufacturer to refrain from obtaining products liability insurance and passing the costs of the premiums on to the Navy; and (b) to encourage the manufacturers to cooperate fully, without apprehension, in the investigation into the causes of any crashes, in order that such causes might be overcome and similar accidents thereby avoided in the future. *Id.* at 2-3.[26] The *Menasco* court also found that the U.S. Navy could have been estopped from pursuing any claim based on the loss of the aircraft because the airframe industry "was well aware of such practice and acted in reliance thereon."[27] *Id.* at 3.

The Commission on Government Procurement similarly reported that, prior to *Menasco*, defense contractors:

> [U]nderstood that the general practice of the government in military contracting was to accept the risk for loss or damage except for the warranted items that were defective . . .
>
> The history of the government's pursuit of claims for lost or damaged property supports the industry understanding of the unwritten policy of self-insurance.

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[26] *See also Can a Company be a Little Bit Liable?*, Business Week, Oct. 18, 1969, at 59 (discussing the fact that if the government did not assume the risk for losses resulting from crashes of aircraft built for its own use, a subcontractor could be at risk for damages far in excess of the value of its contract) (*see* doc. 340, Ex. 7).

[27] Nonetheless, the court held that the protections afforded by the practice of the U.S. Navy did not preclude the ultimate purchaser of the aircraft, Australia, from seeking such damages from the contractor. *Menasco*, Civ. No. 69-1623-WPG, at 4-5.

> Except for nominal repairs and replacements, there is little precedent in the courts, boards of contract appeals, or the General Accounting Office on claims against contractors . . . for recovery of such damages.

Comm'n Report at 92.

The filing of the *Menasco* suit engendered numerous expressions of concern from defense contractors, prompting the DOD to formalize its unwritten practice. *Id.* In 1971, the DOD issued *Defense Procurement Circular 86*, which sets forth the Armed Services Procurement Regulations limiting contractor liability for defects. This was the prototype for the modern version of the High-Value Items Clause.

V. *The Court's Analysis*

A. *The High-Value Items Clause Is Inapplicable To False Claims Act Cases.*

This Court holds as a matter of law that the Third Affirmative Defense asserted by Defendant, which invokes the High-Value Items Clause, set forth in 48 C.F.R. §§ 46.800 *et seq.* & 52.246-24 (1999), and incorporated into the contracts between the Government and Boeing, provides no defense to the Government's and Relator's claims against Boeing for violations of the False Claims Act. As a point of clarification, we note that this Court is not holding that the High-Value Items Clause is void and without effect when applied to the statutory or common-law claims.[28] In fact, we believe that the High-Value Items Clause may be used by a defendant as a defense to a breach of contract or negligence action in order to limit defendant's liability for any loss, destruction, or damage to governmental property in situations

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[28] Nor is this Court rendering a judgment at this time as to the issue of the merits of liability against Defendant in regards to the FCA or to the other fraud, contract, and tort claims that have been alleged by the Government and Relator in this action.

where there is no proof of "willful misconduct" or "lack of good faith" by a defendant's managerial personnel. *See* 48 C.F.R. 46.803(d)(2) (1999). However, the High-Value Items Clause cannot be construed to preclude or limit liability damages for violations of the False Claims Act. The very language of the enabling regulation, F.A.R. § 46.800 *et seq.* which authorizes the HVIC in DOD contracts, limits its application to contractual remedies. Yet, claims under the False Claims Act are not contractual remedies. Therefore, the High-Value Items Clause is applicable only to contractual remedies and not to claims premised under the False Claims Act. Several aspects of the HVIC and the FCA lead this Court to this conclusion.

First, the HVIC itself is silent as to whether the HVIC applies to FCA claims, and, conversely, the FCA is silent as to whether the HVIC provides a contractor-defendant an affirmative defense to violations under the statute.[29] Congress deliberately set the FCA damages provision apart from other types of damages, including tort and contract damages. This Court is not willing to interpret the FCA or the HVIC in the way that Defendant wants in this case. *See Pickens v. Kanawha River Towing*, 916 F.Supp. 702, 705 (S.D.Ohio) ("Courts should give effect to two statutes that overlap unless there is a 'positive repugnancy between the two laws.'") (quoting *Connecticut National v. Germain*, 503 U.S. 249, 253, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992)) Moreover, the power to amend the Act rests with the Congress and not this Court. The very fact that Congress was willing to amend the

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[29] Common defenses to FCA actions include: (1) negligence or innocent mistake; (2) criminal penalties and civil damages that may violate double jeopardy; (3) substantial compliance; and (4) governmental acquiescence. *See* Paul W. Morenberg, Comment, *Environmental Fraud by Government Contractors; A New Application of the False Claims Act*, 22 B.C. Envtl. Aff. L.Rev. 623, 645-46 (1995).

terms and provisions of the FCA in 1943 [30] and 1986,[31] while not including the application of the HVIC as a limitation or defense to the statute's penalty provisions is powerful evidence that Congress never planned for the HVIC's applicability to the FCA. This Court can only highlight that, as of the date of this Order, both the FCA and the HVIC are silent in regards to each other, and until Congress says otherwise, we cannot substitute our judgment for the will of Congress. *See Pickens*, 916 F.Supp. at 705 ("Generally federal law disfavors preemption of one federal law by another, unless there is an 'express manifestation of intent.'") (quoting *United States v. General Dynamics*, 19 F.3d 770, 774 (2d Cir.1994)).

Second, claims under the FCA do not arise pursuant to a contract.[32] *See United States v. Woodbury*, 359 F.2d 370, 377 (9th Cir.1966) (finding that the legal basis of claims is an

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[30] For example, the 1943 Amendments to the FCA effectively restrained the relator when Congress voted to bar *qui tam* suits that utilized information possessed by the government, even in cases where the relator discovered the alleged fraud. S.Rep. No. 99-345, at 11-12 (1986). In addition, Congress instituted a notice requirement that compelled the *qui tam* relators to advise the government of their claims and to disclose all significant evidence. *Id.* at 12. The amendments also allowed the United States to join the *qui tam* suits and to control the litigation strategy. *Id.*

[31] The 1986 amendments effectively revitalized the relator by expanding the FCA definition of fraud, increased both statutory fines and damages, liberalized the requirements for standing, and enhanced relator awards. *See* Michael S. McGarry, *Winning the War on Procurement Fraud: Victory at What Price?*, 26 Colum. J.L. & Soc. Probs. 249, 257 (1993).

[32] There are three central elements of a FCA action: (1) a claim that is presented to the government; (2) that is false or fraudulent; and (3) that claim is presented to the government by a "knowing" defendant. *See* Title 31 U.S.C. 3729(a).

Note: That the terms and provisions of the contract, or the "contract" itself, is not an element of a FCA violation.

intentional violation of the FCA and is not a mere breach of contract); *see also Ueber*, 299 F.2d at 313 (finding that the FCA was violated not by merely entering into a contract, but by the submission of fraudulent vouchers for payment). Claims under the FCA arise when a person knowingly presents or causes to be presented a false or fraudulent claim, or knowingly makes, uses or causes to be made or uses a false record or statement to get a false or fraudulent claim paid. *See, e.g.*, Title 31 U.S.C. § 3729(a)-(c) (defining a "claim" as "any request or demand, whether under contract or otherwise, for money or property . . ."); *United States v. Neifert-White Co.*, 390 U.S. 228, 233, 88 S.Ct. 959, 19 L.Ed.2d 1061 (1968) ("This remedial statute reaches beyond 'claims' which might be legally enforced to [include] all fraudulent attempts to cause the government to pay out sums of money."); *McLeod*, 721 F.2d at 284-85 (concluding that a "knowing endorsement" of a mistakenly issued Treasury check is a false claim). As we concluded above, the appropriate reading of the HVIC is one that is consistent with the plain language of both the HVIC itself and the FCA. Since claims brought under the FCA are not contract-based claims or dependent upon the degree of negligence involved, the claims are unimpaired by contractual limitations on liability.[33]

Third, there is no evidence that the DOD intended that the HVIC have such an impact on FCA claims. In fact, all of the historical records concerning the *Menasco* case focused upon contractual and products liability/negligence claims. *See Menasco*, Civ. No. 69-1623-WPG, at 2 (noting that it was not the practice of the Navy to make damage claims against the aircraft manufacturers for "negligence or breach of

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[33] The F.A.R. expressly states that "[i]n contracts requiring delivery of high-value items, the Government will relieve contractors of contractual liability [not necessarily liability based on fraud or fraudulent conduct] for loss or damage to those items." 48 C.F.R. § 46.803(b) (1999) (brackets added).

warranty"); *see also In re Gulf & Midlands Barge Line, Inc.*, 509 F.2d at 719-20 (finding that the contract provided that the towing company would not be liable for "any peril", including the negligence of the crew). Therefore, Defendant's argument that, as a result of the *Menasco* case, and its progeny, the HVIC was promulgated to limit contractor liability under the FCA, is without support.

Finally, Defendant cites to the case of *United States Cartridge* as being directly on point with the issues at bar. The Court recognizes that this is the only case cited by either Party that addresses the issue of the limitation of liability in regards to a defendant-contractor being sued by the government under a prior version of the FCA. *See United States Cartridge*, 198 F.2d at 457-58. In addition, Defendant is correct when it asserts that the Eighth Circuit ultimately held in favor of the contractor and against the government when the court found that the contract provision pertaining to the limitation of liability did limit the government's claims under the FCA. *Id.* at 465.

However, this Court finds that the case of *United States Cartridge* is distinguishable in many respects from the case at bar. First, the underlying theme throughout the case was the exigencies of the then-imminent World War II, and the case was decided under an earlier version of the War Powers Act. *Id.* at 463. Second, the government contracts required the munitions contractor to hire a whole new and untrained workforce and to build munition factories under the direct control and supervision of the government. *Id.* at 463-64. The Eighth Circuit expressly stated that the analysis of the case would not be applicable to:

> [T]he conventional relationship between the government and a commercial corporate contractor not subject to government supervision and control, for the supplying of goods and services, and if the provisions limiting liability were to be viewed merely as an attempt to relieve

> such a contractor from liability for its own fraud, [then] the government's argument [that public policy precluded enforcement of the limitation of liability clause] might perhaps be unanswerable . . .
>
> *But this was not a conventional government contract made under normal conditions; it was an unusual arrangement made to meet a crisis.*

Id. at 464 (emphasis added). The Eighth Circuit also found that the contract in question was "replete with provisions for the [government] to retain control over the operation of the plant and its personnel, even though they are designated as defendant's employees." *United States Cartridge*, 198 F.2d at 463. These are but a few of the unique facts, circumstances, and issues in *United States Cartridge* which we find to be completely distinguishable or absent from the instant matter. To compare the emergency situation and unique facts and circumstances of *United States Cartridge*, in which the munition facilities and its employees were "in reality . . . an instrumentality of the government," [34] is simply wrong; and misses the mark between extensive governmental control of a prime contractor,[35] and limited governmental monitoring. Thus, this Court does not find *United States Cartridge* to be persuasive or applicable in the case at bar.

Accordingly, The Government's Motion for Partial Summary Judgment as to Defendant's Third Affirmative Defense Re: The High-Value Items Clause (doc. 296) is found to be well-taken, and is hereby GRANTED and Defendant's Third Affirmative Defense is DISMISSED.

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[34] *Id.* at 464.

[35] The Eighth Circuit noted that, "Congress, we believe, clearly intended to give the Secretary of War virtually a freehand in providing the means of meeting the emergency which existed." *United States Cartridge*, 198 F.2d at 463.

CONCLUSION

For the foregoing reasons, Aerospace's Motion for Leave to Participate as *Amicus Curiae* (doc. 402) is GRANTED, and the Government's Motion for Partial Summary Judgment (doc. 296) is also GRANTED. Accordingly, Defendant's Third Affirmative Defense re: The High-Value Items Clause is hereby DISMISSED

SO ORDERED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed [illegible] 18, 2000]

No. 00-0309

UNITED STATES OF AMERICA, ex rel. BRETT ROBY,
Plaintiffs-Respondents,

v.

THE BOEING COMPANY,
Defendant-Petitioner.

ORDER

Before: JONES, RYAN, and CLAY, Circuit Judges.

The defendant in this action under the False Claims Act seeks permission to appeal two questions that the district court has certified pursuant to 28 U.S.C. § 1292(b) for interlocutory appeal:

> 1. Whether the United States can recover damages under the False Claims Act for loss of a helicopter resulting from the failure of a defective flight-critical component part; and
>
> 2. Whether the High-Value Items Clause contained in the Federal Acquisition Regulations § 52.246-24 and incorporated in the Boeing CH-47D helicopter contract operates as a defense to damages sought under the False Claims Act for the loss of or damage to a helicopter resulting from the failure of a defective component part.

The plaintiffs concur in the petition.

Upon consideration, the petition for permission to appeal hereby is GRANTED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed Aug. 3, 2000]

CASE NO. C-1-95-375
JUDGE S. ARTHUR SPIEGEL

UNITED STATES OF AMERICA *ex rel.* BRETT ROBY,
Plaintiff,

v.

THE BOEING COMPANY,
Defendant.

ORDER TO AMEND AND CERTIFY

This Court hereby determines, for the reasons stated below, that, pursuant to 28 U.S.C. § 1292(b), the Court's Orders of November 2, 1999 and December 30, 1999 and the Order denying The Boeing Company's Motion to Reconsider in Part the Court's Order of December 30, 1999 involve the following controlling questions of law as to which there is substantial ground for difference of opinion, and that an immediate appeal will materially advance the ultimate termination of the litigation:

> In August 1990, pursuant to a contract to re-manufacture CH-47D helicopters for the Army, Boeing delivered a re-manufactured CH-47D helicopter to the Army and submitted a claim(s) for payment to the Government for the re-manufactured helicopter. Between delivery and January 1991, the helicopter flew 56 flight hours. On January 11, 1991, a defective flight-critical transmission

gear failed resulting in the helicopter being destroyed. A new CH-47D helicopter was purchased from Boeing to replace the destroyed helicopter.

Assuming arguendo that the necessary elements of the False Claims Act are satisfied, the following questions of law arise:

1. Whether the United States can recover damages under the False Claims Act for loss of a helicopter resulting from the failure of a defective flight-critical component part; and

2. Whether the High-Value Items Clause contained in the Federal Acquisition Regulations § 52.246-24 and incorporated in the Boeing CH-47D helicopter contract operates as a defense to damages sought under the False Claims Act for the loss of or damage to a helicopter resulting from the failure of a defective component part.

The Parties agree that resolution of these two questions of law do not involve disputed issues of fact.

These issues involve controlling questions of law as to which there is substantial ground for difference of opinion. With respect to the first question, whether the Government may recover damages under the False Claims Act for loss of a helicopter resulting from the failure of a defective flight critical component part is an issue that courts have not addressed. With respect to the second question, the High-Value Items Clause ("HVIC") is a procurement provision contained in numerous Government contracts including the helicopter contracts at issue in this case. The Boeing Company asserts that the HVIC operates as a limitation on damages available under the False Claims Act ("FCA"). The Government contends that the HVIC is not a defense to damages under the Act. Whether the HVIC operates as a defense to FCA damages is an issue of first impression in the

federal courts of the United States and there are no other cases directly on point. The Court has found that the defense and aerospace industry has an important interest in seeing the issue resolved.

Furthermore, this Court finds that an immediate interlocutory appeal will materially advance the ultimate termination of this litigation. Pursuant to two separate settlement agreements dated August 3, 2000 between Boeing and the United States and Boeing and Relator Brett Roby, respectively, if the Sixth Circuit Court of Appeals accepts for interlocutory review, and decides on the merits, these two controlling questions of law, the parties have agreed to a settlement of all outstanding claims in this case. Without interlocutory review, the parties will proceed to a trial which is expected to take several months. By the terms of the settlement agreements, the parties have stipulated to the two legal questions for appellate review.[1]

This Court therefore concludes that these issues should be certified under 28 U.S.C. § 1292(b) for interlocutory appeal and that the Court's Orders of November 2, 1999 and December 30, 1999 and the Order denying The Boeing

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[1] The agreements provide in relevant part that for purposes of the appeal, the parties will and have stipulated that i) the loss of the helicopter was the result of the failure of the defective flight-critical gear; ii) they will not argue to the reviewing courts that there needs to be any additional fact-finding on the two Damages Issues; iii) the exceptions to the High-Value Items Clause, found at F.A.R. § 52.246-24(b) and (c) (Apr. 1984), based on the Contractor having insurance or there being willful misconduct or lack of good faith on the part of any of the Contractor's managerial personnel, are not at issue; iv) the version of the False Claims Act in effect at the date of the Agreement and the version of the High-Value Items Clause incorporated into the helicopter contracts, F.A.R. § 52.246-24 (Apr. 1984), shall govern this appeal; and v) the helicopter at issue is a high-value item under the High-Value Items Clause.

Company's Motion to Reconsider in Part the Court's Order of December 30, 1999 are hereby amended to reflect this certification.

Date: 8/3/00 /s/ [illegible]
S. ARTHUR SPIEGEL
United States Senior District Court Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed Jan. 24, 2003]

No. 00-4157

UNITED STATES OF AMERICA, EX REL. BRETT ROBY,
Plaintiffs-Appellees,

v.

BOEING COMPANY,
Defendant-Appellant.

ORDER

BEFORE: MERRITT, BOGGS, and MOORE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Boggs would grant rehearing for the reasons states in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN, Clerk

APPENDIX G

10 U.S.C. § 2202. Regulations on procurement, production, warehousing, and supply distribution functions

The Secretary of Defense shall prescribe regulations governing the performance within the Department of Defense of the procurement, production, warehousing, and supply distribution functions, and related functions, of the Department of Defense.

(Aug. 10, 1956, c. 1041, 70A Stat. 120; Dec. 4, 1987, Pub.L. 100-180, Div. A, Title XII, § 1202, 101 Stat. 1153; Oct. 13, 1994, Pub.L. 103-355, Title III, § 3061(a), 108 Stat. 3336.)

31 U.S.C. § 3729. False claims

(a) Liability for certain acts.—Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined.—For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information—

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) Claim defined.—For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure.—Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion.—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 978; Pub.L. 99-562, § 2, Oct. 27, 1986, 100 Stat. 3153; Pub.L. 103-272, § 4(f)(1)(O), July 5, 1994, 108 Stat. 1362.)

31 U.S.C. § 3731. False claims procedure

* * * *

(b) A civil action under section 3730 may not be brought—

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

* * * *

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 979; Pub.L. 99-562, § 5, Oct. 27, 1986, 100 Stat. 3158.)

41 U.S.C. § 405. Authority and functions of the Administrator

(a) Development of procurement policy; leadership

The Administrator shall provide overall direction of procurement policy and leadership in the development of procurement systems of the executive agencies. To the extent that the Administrator considers appropriate, in carrying out the policies and functions set forth in this chapter, and with due regard for applicable laws and the program activities of the executive agencies, the Administrator may prescribe Government-wide procurement policies. These policies shall be implemented in a single Government-wide procurement regulation called the Federal Acquisition Regulation and shall be followed by executive agencies in the procurement of—

(1) property other than real property in being;

(2) services, including research and development; and

(3) construction, alteration, repair, or maintenance of real property.

* * * *

(Pub.L. 93-400, § 6, Aug. 30, 1974, 88 Stat. 797; Pub.L. 96-83, § 4, Oct. 10, 1979, 93 Stat. 649; Pub.L. 98-191, § 5, Dec. 1, 1983, 97 Stat. 1326; Pub.L. 98-369, Div. B, Title VII, § 2732(b)(1), July 18, 1984, 98 Stat. 1199; Pub.L. 100-679, § 3(a), Nov. 17, 1988, 102 Stat. 4055; Pub.L. 103-355, Title I, § 1091(b)(2), Title V, §§ 5051(b), 5091, Title VII, § 7108(a), (b), Oct. 13, 1994, 108 Stat. 3272, 3351, 3361, 3378; Pub.L. 104-106, Div. D, Title XLIII, §§ 4307(b), 4321(h)(1), (2), 4322(a)(1), Div. E, Title LVI, § 5607(d), Feb. 10, 1996, 110 Stat. 668, 675, 677, 702; Pub.L. 104-201, Div. A, Title X, § 1074(f)(1), Sept. 23, 1996, 110 Stat. 2661; Pub.L. 105-85, Div. A, Title VIII, § 851(b), Title X, § 1073(g)(2)(B), Nov. 18, 1997, 111 Stat. 1851, 1906; Pub.L. 105-135, Title VI, § 604(f)(1), Dec. 2, 1997, 111 Stat. 2634.)

APPENDIX H

48 C.F.R. § 1.103. Authority.

(a) The development of the FAR System is in accordance with the requirements of the Office of Federal Procurement Policy Act of 1974 (Pub.L. 93-400), as amended by Pub.L. 96-83.

(b) The FAR is prepared, issued, and maintained, and the FAR System is prescribed, jointly by the Secretary of Defense, the Administrator of General Services, and the Administrator, National Aeronautics and Space Administration, under their several statutory authorities.

[51 Fed. Reg. 27116, July 29, 1986; (FAC) 90-29, FAR Case 95-10, Item I, 60 Fed. Reg. 34733, July 3, 1995; (FAC) 97-18, (FAR) Case 2000-605, Item I, 65 Fed. Reg. 36014, June 6, 2000]

48 C.F.R. § 1.104. Applicability.

The FAR applies to all acquisitions as defined in Part 2 of the FAR, except where expressly excluded.

[(FAC) 90-29, FAR Case 95-10, Item I, 60 Fed. Reg. 34733, July 3, 1995]

48 C.F.R. § 31.205-19. Insurance and indemnification.

(a) Insurance by purchase or by self-insuring includes coverage the contractor is required to carry, or to have approved, under the terms of the contract and any other coverage the contractor maintains in connection with the general conduct of its business. Any contractor desiring to establish a program of self-insurance applicable to contracts that are not subject to 48 CFR 9904.416, Accounting for Insurance Costs, shall comply with the self-insurance

requirements of that standard as well as with part 28 of this Regulation. However, approval of a contractor's insurance program in accordance with part 28 does not constitute a determination as to the allowability of the program's cost. The amount of insurance costs which may be allowed is subject to the cost limitations and exclusions in the following subparagraphs.

* * * *

(2) Costs of insurance maintained by the contractor in connection with the general conduct of its business are allowable, subject to the following limitations:

* * * *

(iv) Costs of insurance for the risk of loss of or damage to Government property are allowable only to the extent that the contractor is liable for such loss or damage and such insurance does not cover loss or damage that results from willful misconduct or lack of good faith on the part of any of the contractor's directors or officers or other equivalent representatives.

* * * *

[50 Fed. Reg. 23607, June 4, 1985; 51 Fed. Reg. 31426, Sept. 3, 1986; (FAC) 90-12; (FAR) Case 92-18, 57 Fed. Reg. 39591, Aug. 31, 1992; (FAC) 90-23, (FAR) Case 92- 18, Item XIX, 59 Fed. Reg. 67042, Dec. 28, 1994]

48 C.F.R. § 46.801. Applicability.

(a) This subpart applies to contracts other than those for (1) information technology, including telecommunications, (2) construction, (3) architect-engineer services, and (4) maintenance and rehabilitation of real property. This subpart does not apply to commercial items.

* * * *

[(FAC) 90-41, (FAR) Case 96-319, Item I, 61 Fed. Reg. 41471, Aug. 8, 1996; (FAC) 97-03, (FAR) Case 96-319, Item II, 62 Fed. Reg. 64914, Dec. 9, 1997; (FAC) 2001-01, (FAR) Case 2000-303, Item II, 66 Fed. Reg. 53484, Oct. 22, 2001]

48 C.F.R. § 46.802. Definition.

"High-value item," as used in this subpart, means a contract end item that (a) has a high unit cost (normally exceeding $100,000 per unit), such as an aircraft, an aircraft engine, a communication system, a computer system, a missile, or a ship, and (b) is designated by the contracting officer as a high-value item.

48 C.F.R. § 46.803. Policy.

(a) General. The Government will generally act as a self-insurer by relieving contractors, as specified in this subpart, of liability for loss of or damage to property of the Government that (1) occurs after acceptance of supplies delivered or services performed under a contract and (2) results from defects or deficiencies in the supplies or services. However, the Government will not relieve the contractor of liability for loss of or damage to the contract end item itself, except for high-value items.

(b) High-value items. In contracts requiring delivery of high-value items, the Government will relieve contractors of contractual liability for loss of or damage to those items. However, this relief shall not limit the Government's rights arising under the contract to—

(1) Have any defective item or its components corrected, repaired, or replaced when the defect or deficiency is discovered before the loss of or damage to a high-value item occurs; or

(2) Obtain equitable relief when the defect or deficiency is discovered after such loss or damage occurs.

(c) Exception. The Government will not provide contractual relief under paragraphs (a) and (b) above when contractor liability can be preserved without increasing the contract price.

(d) Limitations. Subject to the specific terms of the limitation of liability clause included in the contract, the relief provided under paragraphs (a) and (b) above does not apply—

(1) To the extent that contractor liability is expressly provided under a contract clause authorized by this regulation;

(2) When a defect or deficiency in, or the Government's acceptance of, the supplies or services results from willful misconduct or lack of good faith on the part of the contractor's managerial personnel; or

(3) To the extent that any contractor insurance, or self-insurance reserve, covers liability for loss or damage suffered by the Government through purchase or use of the supplies delivered or services performed under the contract.

48 C.F.R. § 52.245-2. Government Property (Fixed-Price Contracts).

As prescribed in 45.106(b)(1), insert the following clause:

GOVERNMENT PROPERTY (FIXED-PRICE CONTRACTS) (DEC 1989)

* * * *

(g) Risk of loss. Unless otherwise provided in this contract, the Contractor assumes the risk of, and shall be responsible for, any loss or destruction of, or damage to, Government property upon its delivery to the Contractor or upon passage

of title to the Government under paragraph (c) of this clause. However, the Contractor is not responsible for reasonable wear and tear to Government property or for Government property properly consumed in performing this contract.

* * * *

(End of clause)

Alternate I (APR 1984). As prescribed in 45.106(b)(2), substitute the following paragraph (g) for paragraph (g) of the basic clause:

(g) Limited risk of loss.

(1) The term "Contractor's managerial personnel," as used in this paragraph (g), means the Contractor's directors, officers, and any of the Contractor's managers, superintendents, or equivalent representatives who have supervision or direction of—

(i) All or substantially all of the Contractor's business;

(ii) All or substantially all of the Contractor's operation at any one plant or separate location at which the contract is being performed; or

(iii) A separate and complete major industrial operation connected with performing this contract.

(2) The Contractor shall not be liable for loss or destruction of, or damage to, the Government property provided under this contract (or, if an educational or nonprofit organization, for expenses incidental to such loss, destruction, or damage), except as provided in subparagraphs (3) and (4) below.

(3) The Contractor shall be responsible for loss or destruction of, or damage to, the Government property provided under this contract (including expenses incidental to such loss, destruction, or damage)—

(i) That results from a risk expressly required to be insured under this contract, but only to the extent of the insurance

required to be purchased and maintained, or to the extent of insurance actually purchased and maintained, whichever is greater;

(ii) That results from a risk that is in fact covered by insurance or for which the Contractor is otherwise reimbursed, but only to the extent of such insurance or reimbursement;

(iii) For which the Contractor is otherwise responsible under the express terms of this contract;

(iv) That results from willful misconduct or lack of good faith on the part of the Contractor's managerial personnel; or

(v) That results from a failure on the part of the Contractor, due to willful misconduct or lack of good faith on the part of the Contractor's managerial personnel, to establish and administer a program or system for the control, use, protection, preservation, maintenance, and repair of Government property as required by paragraph (e) of this clause.

(4)(i) If the Contractor fails to act as provided in subdivision (g)(3)(v) above, after being notified (by certified mail addressed to one of the Contractor's managerial personnel) of the Government's disapproval, withdrawal of approval, or nonacceptance of the system or program, it shall be conclusively presumed that such failure was due to willful misconduct or lack of good faith on the part of the Contractor's managerial personnel.

(ii) In such event, any loss or destruction of, or damage to, the Government property shall be presumed to have resulted from such failure unless the Contractor can establish by clear and convincing evidence that such loss, destruction, or damage—

(A) Did not result from the Contractor's failure to maintain an approved program or system; or

(B) Occurred while an approved program or system was maintained by the Contractor.

(5) If the Contractor transfers Government property to the possession and control of a subcontractor, the transfer shall not affect the liability of the Contractor for loss or destruction of, or damage to, the property as set forth above. However, the Contractor shall require the subcontractor to assume the risk of, and be responsible for, any loss or destruction of, or damage to, the property while in the subcontractor's possession or control, except to the extent that the subcontract, with the advance approval of the Contracting Officer, relieves the subcontractor from such liability. In the absence of such approval, the subcontract shall contain appropriate provisions requiring the return of all Government property in as good condition as when received, except for reasonable wear and tear or for its use in accordance with the provisions of the prime contract.

(6) Upon loss or destruction of, or damage to, Government property provided under this contract, the Contractor shall so notify the Contracting Officer and shall communicate with the loss and salvage organization, if any, designated by the Contracting Officer. With the assistance of any such organization, the Contractor shall take all reasonable action to protect the Government property from further damage, separate the damaged and undamaged Government property, put all the affected Government property in the best possible order, and furnish to the Contracting Officer a statement of—

(i) The lost, destroyed, or damaged Government property;

(ii) The time and origin of the loss, destruction, or damage;

(iii) All known interests in commingled property of which the Government property is a part; and

(iv) The insurance, if any, covering any part of or interest in such commingled property.

(7) The Contractor shall repair, renovate, and take such other action with respect to damaged Government property as the Contracting Officer directs. If the Government property is destroyed or damaged beyond practical repair, or is damaged and so commingled or combined with property of others (including the Contractor's) that separation is impractical, the Contractor may, with the approval of and subject to any conditions imposed by the Contracting Officer, sell such property for the account of the Government. Such sales may be made in order to minimize the loss to the Government, to permit the resumption of business, or to accomplish a similar purpose. The Contractor shall be entitled to an equitable adjustment in the contract price for the expenditures made in performing the obligations under this subparagraph (g)(7) in accordance with paragraph (h) of this clause. However, the Government may directly reimburse the loss and salvage organization for any of their charges. The Contracting Officer shall give due regard to the Contractor's liability under this paragraph (g) when making any such equitable adjustment.

(8) The Contractor represents that it is not including in the price and agrees it will not hereafter include in any price to the Government any charge or reserve for insurance (including any self-insurance fund or reserve) covering loss or destruction of, or damage to, Government property, except to the extent that the Government may have expressly required the Contractor to carry such insurance under another provision of this contract.

(9) In the event the Contractor is reimbursed or otherwise compensated for any loss or destruction of, or damage to, Government property, the Contractor shall use the proceeds to repair, renovate, or replace the lost, destroyed, or damaged Government property or shall otherwise credit the proceeds to or equitably reimburse the Government, as directed by the Contracting Officer. .

(10) The Contractor shall do nothing to prejudice the Government's rights to recover against third parties for any

loss or destruction of, or damage to, Government property. Upon the request of the Contracting Officer, the Contractor shall, at the Government's expense, furnish to the Government all reasonable assistance and cooperation (including the prosecution of suit and the execution of instruments of assignment in favor of the Government) in obtaining recovery. In addition, where a subcontractor has not been relieved from liability for any loss or destruction of, or damage to, Government property, the Contractor shall enforce for the benefit of the Government the liability of the subcontractor for such loss, destruction, or damage.

Alternate II (JUL 1985). As prescribed in 45.106(b)(3), substitute the following paragraphs (c) and (g) for paragraphs (c) and (g) of the basic clause:

* * * *

(g) Limited risk of loss.

(1) The term "Contractor's managerial personnel," as used in this paragraph (g), means the Contractor's directors, officers, and any of the Contractor's managers, superintendents, or equivalent representatives who have supervision or direction of—

(i) All or substantially all of the Contractor's business;

(ii) All or substantially all of the Contractor's operation at any one plant, laboratory, or separate location at which the contract is being performed; or

(iii) A separate and complete major industrial operation connected with performing this contract.

(2) The Contractor shall not be liable for loss or destruction of, or damage to, the Government property provided under this contract (or, if an educational or nonprofit organization, for expenses incidental to such loss, destruction, or damage), except as provided in subparagraphs (3) and (4) below.

(3) The Contractor shall be responsible for loss or destruction of, or damage to, the Government property provided under this contract (including expenses incidental to such loss, destruction, or damage)—

(i) That results from a risk expressly required to be insured under this contract, but only to the extent of the insurance required to be purchased and maintained, or to the extent of insurance actually purchased and maintained, whichever is greater;

(ii) That results from a risk which is in fact covered by insurance or for which the Contractor is otherwise reimbursed, but only to the extent of such insurance or reimbursement;

(iii) For which the Contractor is otherwise responsible under the express terms of this contract;

(iv) That results from willful misconduct or lack of good faith on the part of the Contractor's managerial personnel; or

(v) That results from a failure on the part of the Contractor, due to willful misconduct or lack of good faith on the part of the Contractor's managerial personnel, to establish and administer a program or system for the control, use, protection, preservation, maintenance, and repair of Government property as required by paragraph (e) of this clause.

(4)(i) If the Contractor fails to act as provided in subdivision (g)(3)(v) above, after being notified (by certified mail addressed to one of the Contractor's managerial personnel) of the Government's disapproval, withdrawal of approval, or nonacceptance of the system or program, it shall be conclusively presumed that such failure was due to willful misconduct or lack of good faith on the part of the Contractor's managerial personnel.

(ii) Furthermore, any loss or destruction of, or damage to, the Government property shall be presumed to have resulted from such failure unless the Contractor can establish by clear and convincing evidence that such loss, destruction, or damage—

(A) Did not result from the Contractor's failure to maintain an approved program or system; or

(B) Occurred while an approved program or system was maintained by the Contractor.

(5) If the Contractor transfers Government property to the possession and control of a subcontractor, the transfer shall not affect the liability of the Contractor for loss or destruction of, or damage to, the property as set forth above. However, the Contractor shall require the subcontractor to assume the risk of, and be responsible for, any loss or destruction of, or damage to, the property while in the subcontractor's possession or control, except to the extent that the subcontract, with the advance approval of the Contracting Officer, relieves the subcontractor from such liability. In the absence of such approval, the subcontract shall contain appropriate provisions requiring the return of all Government property in as good condition as when received, except for reasonable wear and tear or for its use in accordance with the provisions of the prime contract.

(6) Upon loss or destruction of, or damage to, Government property provided under this contract, the Contractor shall so notify the Contracting Officer and shall communicate with the loss and salvage organization, if any, designated by the Contracting Officer. With the assistance of any such organization, the Contractor shall take all reasonable action to protect the Government property from further damage, separate the damaged and undamaged Government property, put all the affected Government property in the best possible order, and furnish to the Contracting Officer a statement of—

(i) The lost, destroyed, or damaged Government property;

(ii) The time and origin of the loss, destruction, or damage;

(iii) All known interests in commingled property of which the Government property is a part; and

(iv) The insurance, if any, covering any part of or interest in such commingled property.

(7) The Contractor shall repair, renovate, and take such other action with respect to damaged Government property as the Contracting Officer directs. If the Government property is destroyed or damaged beyond practical repair, or is damaged and so commingled or combined with property of others (including the Contractor's) that separation is impractical, the Contractor may, with the approval of and subject to any conditions imposed by the Contracting Officer, sell such property for the account of the Government. Such sales may be made in order to minimize the loss to the Government, to permit the resumption of business, or to accomplish a similar purpose. The Contractor shall be entitled to an equitable adjustment in the contract price for the expenditures made in performing the obligations under this subparagraph (g)(7) in accordance with paragraph (h) of this clause. However, the Government may directly reimburse the loss and salvage organization for any of their charges. The Contracting Officer shall give due regard to the Contractor's liability under this paragraph (g) when making any such equitable adjustment.

(8) The Contractor represents that it is not including in the price, and agrees it will not hereafter include in any price to the Government, any charge or reserve for insurance (including any self-insurance fund or reserve) covering loss or destruction of, or damage to, Government property, except to the extent that the Government may have expressly required the Contractor to carry such insurance under another provision of this contract.

(9) In the event the Contractor is reimbursed or otherwise compensated for any loss or destruction of, or damage to, the Government property, the Contractor shall use the proceeds to

repair, renovate, or replace the lost, destroyed, or damaged Government property or shall otherwise credit the proceeds to or equitably reimburse the Government, as directed by the Contracting Officer.

(10) The Contractor shall do nothing to prejudice the Government's rights to recover against third parties for any loss or destruction of, or damage to, Government property. Upon the request of the Contracting Officer, the Contractor shall, at the Government's expense, furnish to the Government all reasonable assistance and cooperation (including the prosecution of suit and the execution of instruments of assignment in favor of the Government) in obtaining recovery. In addition, where a subcontractor has not been relieved from liability for any loss or destruction of, or damage to, Government property, the Contractor shall enforce for the benefit of the Government the liability of the subcontractor for such loss, destruction, or damage.

[50 Fed. Reg. 26904, June 28, 1985; 54 Fed. Reg. 48995, Nov. 28, 1989]

48 C.F.R. § 52.245-8. Liability for the Facilities.

As prescribed in 45.302-6(b), insert the following clause:

LIABILITY FOR THE FACILITIES (JAN 1997)

* * * *

(c) The Contractor shall be liable for loss or destruction of, or damage to, the facilities, and for expenses incidental to such loss, destruction, or damage—

(1) That results from a risk expressly required to be insured under this contract, but only to the extent of the insurance required to be purchased and maintained, or to the extent of insurance actually purchased and maintained, whichever is greater;

(2) That results from a risk that is in fact covered by insurance or for which the Contractor is otherwise reimbursed, but only to the extent of such insurance or reimbursement;

(3) For which the Contractor is otherwise responsible under the express terms of this contract;

(4) That results from willful misconduct or lack of good faith on the part of the Contractor's managerial personnel; or

(5) That results from a failure, due to willful misconduct or lack of good faith on the part of the Contractor's managerial personnel—

(i) To establish, maintain, and administer a system for control of the facilities in accordance with the "Property administration" paragraph of the Government Property clause; or

(ii) To maintain and administer a program for maintenance, repair, protection, and preservation of the facilities, in accordance with the "Property administration" paragraph of the Government Property clause, or to take reasonable steps to comply with any appropriate written direction that the Contracting Officer may prescribe as reasonably necessary for the protection of the facilities. If the Government Property clause does not include the "Property administration" paragraph, then the Contractor shall exercise sound industrial practice in complying with the requirements of this subdivision (c)(5)(ii).

* * * *

(End of clause)

[(FAC) 90-45, (FAR) Case 96-312, Item II, 62 Fed. Reg. 239, Jan. 2, 1997]

48 C.F.R. § 52.246-23. Limitation of Liability.

As prescribed in 46.805, insert the following clause:

LIMITATION OF LIABILITY (FEB 1997)

(a) Except as provided in paragraphs (b) and (c) below, and except for remedies expressly provided elsewhere in this contract, the Contractor shall not be liable for loss of or damage to property of the Government (excluding the supplies delivered under this contract) that (1) occurs after Government acceptance of the supplies delivered under this contract and (2) results from any defects or deficiencies in the supplies.

(b) The limitation of liability under paragraph (a) above shall not apply when a defect or deficiency in, or the Government's acceptance of, the supplies results from willful misconduct or lack of good faith on the part of any of the Contractor's managerial personnel. The term "Contractor's managerial personnel," as used in this clause, means the Contractor's directors, officers, and any of the Contractor's managers, superintendents, or equivalent representatives who have supervision or direction of—

(1) All or substantially all of the Contractor's business;

(2) All or substantially all of the Contractor's operations at any one plant, laboratory, or separate location at which the contract is being performed; or

(3) A separate and complete major industrial operation connected with the performance of this contract.

(c) If the Contractor carries insurance, or has established a reserve for self-insurance, covering liability for loss or damage suffered by the Government through purchase or use of the supplies required to be delivered under this contract, the Contractor shall be liable to the Government, to the extent of such insurance or reserve, for loss of or damage to property of the Government occurring after Government acceptance of,

and resulting from any defects or deficiencies in, the supplies delivered under this contract.

(End of clause)

[(FAC) 90-29, (FAR) Case 94-770, Item III, 60 Fed. Reg. 34762, July 3, 1995; (FAC) 90-40, (FAR) Cases 94-770, 94-771, Item II, 61 Fed. Reg. 39190, July 26, 1996; (FAC) 90-43, (FAR) Case 92-035, Item XII, 61 Fed. Reg. 67426, Dec. 20, 1996]

48 C.F.R. § 52.246-24. Limitation of Liability—High-Value Items.

As prescribed in 46.805, insert the following clause:

LIMITATION OF LIABILITY—HIGH-VALUE ITEMS (FEB 1997)

(a) Except as provided in paragraphs (b) through (e) below, and notwithstanding any other provision of this contract, the Contractor shall not be liable for loss of or damage to property of the Government (including the supplies delivered under this contract) that (1) occurs after Government acceptance of the supplies delivered under this contract and (2) results from any defects or deficiencies in the supplies.

(b) The limitation of liability under paragraph (a) above shall not apply when a defect or deficiency in, or the Government's acceptance of, the supplies results from willful misconduct or lack of good faith on the part of any of the Contractor's managerial personnel. The term "Contractor's managerial personnel," as used in this clause, means the Contractor's directors, officers, and any of the Contractor's managers, superintendents, or equivalent representatives who have supervision or direction of—

(1) All or substantially all of the Contractor's business;

(2) All or substantially all of the Contractor's operations at any one plant, laboratory, or separate location at which the contract is being performed; or

(3) A separate and complete major industrial operation connected with the performance of this contract.

(c) If the Contractor carries insurance, or has established a reserve for self-insurance, covering liability for loss or damage suffered by the Government through purchase or use of the supplies required to be delivered under this contract, the Contractor shall be liable to the Government, to the extent of such insurance or reserve, for loss of or damage to property of the Government occurring after Government acceptance of, and resulting from any defects or deficiencies in, the supplies delivered under this contract.

(d)(1) This clause does not diminish the Contractor's obligations, to the extent that they arise otherwise under this contract, relating to correction, repair, replacement, or other relief for any defect or deficiency in supplies delivered under this contract.

(2) Unless this is a cost-reimbursement contract, if loss or damage occurs and correction, repair, or replacement is not feasible or desired by the Government, the Contractor shall, as determined by the Contracting Officer—

(i) Pay the Government the amount it would have cost the Contractor to make correction, repair, or replacement before the loss or damage occurred; or

(ii) Provide other equitable relief.

(e) This clause shall not limit or otherwise affect the Government's rights under clauses, if included in this contract, that cover—

(1) Warranty of technical data;

(2) Ground and flight risks or aircraft flight risks; or

(3) Government property.

(This clause shall apply only to those items identified in this contract as being subject to this clause.)

(End of clause)

Alternate I (APR 1984). If the contract is for both high-value items and other end items, the contracting officer shall identify the high-value items by line item and insert the following preamble before paragraph (a):

(This clause shall apply only to those items identified in this contract as being subject to this clause.)

[(FAC) 90-29, (FAR) Case 94-770, Item III, 60 Fed. Reg. 34762, July 3, 1995; (FAC) 90-40, (FAR) Cases 94-770, 94-771, Item II, 61 Fed. Reg. 39190, July 26, 1996; (FAC) 90-43, (FAR) Case 92-035, Item XII, 61 Fed. Reg. 67426, Dec. 20, 1996]

48 C.F.R. § 52.246-25. Limitation of Liability—Services.

As prescribed in 46.805, insert the following clause:

LIMITATION OF LIABILITY—SERVICES (FEB 1997)

(a) Except as provided in paragraphs (b) and (c) below, and except to the extent that the Contractor is expressly responsible under this contract for deficiencies in the services required to be performed under it (including any materials furnished in conjunction with those services), the Contractor shall not be liable for loss of or damage to property of the Government that (1) occurs after Government acceptance of services performed under this contract and (2) results from any defects or deficiencies in the services performed or materials furnished.

(b) The limitation of liability under paragraph (a) above shall not apply when a defect or deficiency in, or the Government's acceptance of, services performed or materials furnished results from willful misconduct or lack of good faith on the part of any of the Contractor's managerial personnel. The

term "Contractor's managerial personnel," as used in this clause, means the Contractor's directors, officers, and any of the Contractor's managers, superintendents, or equivalent representatives who have supervision or direction of—

(1) All or substantially all of the Contractor's business;

(2) All or substantially all of the Contractor's operations at any one plant, laboratory, or separate location at which the contract is being performed; or

(3) A separate and complete major industrial operation connected with the performance of this contract.

(c) If the Contractor carries insurance, or has established a reserve for self-insurance, covering liability for loss or damage suffered by the Government through the Contractor's performance of services or furnishing of materials under this contract, the Contractor shall be liable to the Government, to the extent of such insurance or reserve, for loss of or damage to property of the Government occurring after Government acceptance of, and resulting from any defects and deficiencies in, services performed or materials furnished under this contract.

(End of clause)

[(FAC) 90-29, (FAR) Case 94-770, Item III, 60 Fed. Reg. 34762, July 3, 1995; (FAC) 90-40, (FAR) Cases 94-770, 94-771, Item II, 61 Fed. Reg. 39190, July 26, 1996; (FAC) 90-43, (FAR) Case 92-035, Item XII, 61 Fed. Reg. 67426, Dec. 20, 1996]

48 C.F.R. § 252.228-7001. Ground and flight risk.

As prescribed in 228.370(b), use the following clause:

Ground and Flight Risk (SEP 1996)

* * * *

(b) Except as may be specifically provided in the Schedule as an exception to this clause, the Government assumes the risk of damage to, or loss or destruction of aircraft in the open, during operation, and in flight. The Contractor shall not be liable to the Government for such damage, loss, or destruction.

* * * *

(End of clause)

[56 Fed. Reg. 67221, Dec. 30, 1991; (DAC) 91-11, 61 Fed. Reg. 50456, Sept. 26, 1996]

(2)

Supreme Court, U.S.
FILED
MAY 23 2003
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No. 02-1411

In the Supreme Court of the United States

THE BOEING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA EX REL. BRETT ROBY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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22 pp

QUESTIONS PRESENTED

1. Whether a contract clause releasing petitioner from liability for "loss of or damage to property of the Government * * * [that] results from any defects or deficiencies in the supplies," 48 C.F.R. 52.246-24(a), precludes the government from recovering damages under the False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*

2. Whether the damages awarded pursuant to the court of appeals' decision exceed the relief to which the government is entitled under the FCA and the parties' settlement agreement.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 302 F.3d 637. The opinions of the district court (Pet. App. 27a-64a, 65a-96a) are reported at 79 F. Supp. 2d 877 and 73 F. Supp. 2d 897.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 2002. A petition for rehearing was denied on January 24, 2003 (Pet. App. 103a). The petition for a writ of certiorari was filed on March 21, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, prohibits "[a]ny person" from "knowingly present[ing], or caus[ing] to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1). The Act also prohibits a variety of related deceptive practices involving government funds and property. 31 U.S.C. 3729(a)(2)-(7). The Act defines "claim" to include "any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded." 31 U.S.C. 3729(c). At the time of the events that gave rise to this suit, a person who violated the FCA was "liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person." 31 U.S.C. 3729(a).[1]

Suits to collect the statutory damages and penalties may be brought either by the Attorney General, or by a private person (known as a relator) in the name of the United States, in an action commonly referred to as a *qui tam* action. See 31 U.S.C. 3730(a) and (b)(1). When a *qui tam* action is brought, the government is given an opportunity to intervene to take over the suit. 31

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[1] After the events that gave rise to this suit, the civil penalty range under the FCA was adjusted upward to a minimum penalty of $5500 and a maximum penalty of $11,000, pursuant to a statutory mandate applicable to civil penalties enforced by all federal agencies. See 64 Fed. Reg. 47,104 (1999).

U.S.C. 3730(b)(2) and (c)(3). If the government declines to intervene, the relator conducts the litigation. 31 U.S.C. 3730(c)(3). If a *qui tam* action results in the recovery of damages and civil penalties, that recovery is divided between the government and the relator. 31 U.S.C. 3730(d).

2. In 1985 and 1989, petitioner Boeing Company contracted with the Department of Defense (DOD) to remanufacture existing Chinook CH-47 helicopters for the United States Army. Pet. App. 2a. The contract required petitioner to ensure the ultimate quality of all the parts used for the remanufacture. *Ibid.* The contract also included a provision known as a High Value Items Clause (HVIC). *Id.* at 1a, 6a-7a. Since 1984, the HVIC has been included in certain military procurement contracts (generally contracts for items whose costs exceed $100,000 per unit) pursuant to the Federal Acquisition Regulation (FAR). See *id.* at 6a. The HVIC represents "the Government's assumption of the risk that a high-value item * * * may be lost or damaged after acceptance as a result of a defect or deficiency in the item." *Id.* at 6a-7a; see 48 C.F.R. 46.803(b) ("In contracts requiring delivery of high-value items, the Government will relieve contractors of contractual liability for loss of or damage to those items."). Pursuant to FAR Section 52.246-24(a), such contracts include the following provision: "[N]otwithstanding any other provision of this contract, the Contractor shall not be liable for loss of or damage to property of the Government * * * that (1) occurs after Government acceptance of the supplies delivered under this contract and (2) results from any defects or deficiencies in the supplies." 48 C.F.R 52.246-24(a).

One of the helicopters remanufactured by petitioner (Aircraft 89-0165) crashed in Saudi Arabia in 1991

during Operation Desert Shield, due to the failure of a flight-critical transmission gear, after flying approximately one fourth of its warrantied flight time. Pet. App. 2a. Fortunately, no soldiers were killed in the crash, but the helicopter and its contents were completely destroyed, with a loss to the government of at least $10 million. *Ibid.* The government subsequently purchased a replacement helicopter at a cost of nearly $13 million. *Ibid.*

3. In May 1995, respondent Brett Roby, an employee of the subcontractor that had supplied the defective transmission gears, filed a *qui tam* action under the FCA, alleging that petitioner and its subcontractor had made false statements about the manufacture and sale of the gears. Pet. App. 2a-3a. Roby alleged that petitioner's claim for payment had falsely represented that the helicopters conformed to all specified contractual requirements. *Id.* at 28a-30a. Roby further alleged that petitioner had installed the defective gears without adequate inspection, knowing that the transmission gears were prone to certain grinding cracks and breakage. See *id.* at 30a. The United States subsequently intervened to take over the conduct of the litigation. *Id.* at 3a.

In its answer, petitioner denied the allegations and contended that the HVIC barred a damages award under the FCA. Pet App. 3a. Petitioner also argued that the damages sought by the government constituted "consequential damages," and that such damages are not available under the FCA. *Ibid.* Petitioner contended that the government's recovery, if any, was limited to "the price of a fully-conforming transmission gear." *Id.* at 15a, 61a.

Ruling on the parties' cross-motions for summary judgment, the district court held that the HVIC "can-

not be construed to preclude or limit liability damages for violations of the [FCA]." Pet. App. 91a; see *id.* at 3a, 90a-95a. The court also found that the damages sought by the government were potentially within the scope of relief available under the FCA. See *id.* at 53a-63a. Shortly before trial, the parties settled the majority of the outstanding claims. *Id.* at 3a. Under the settlement, petitioner agreed that it would, *inter alia*, make an immediate payment to the United States of $25 million. *Ibid.* That amount did not resolve the government's FCA claim arising out of the crash of Aircraft 89-0165. *Ibid.* Rather, the parties agreed that the disposition of that claim would turn on the resolution of two questions, which the district court certified for interlocutory appeal:

> 1. Whether the Government can recover damages under the FCA for loss of a helicopter resulting from the failure of a defective flight-critical component part; and
>
> 2. Whether the HVIC contained in FAR § 52.246-24 and incorporated in the * * * contract operates as a defense to damages sought under the FCA for the loss of or damage to a helicopter resulting from the failure of a defective component part.

Id. at 4a (brackets omitted). The parties agreed that petitioner would be liable for an additional payment of $15 million if the court of appeals resolved the certified questions in the government's favor. See *id.* at 3a.

4. The court of appeals granted leave to appeal. See Pet. App. 4a. After considering the certified questions, it affirmed the judgment of the district court. *Id.* at 1a-26a.

a. The court of appeals held that the HVIC did not affect petitioner's FCA liability. Pet. App. 5a-14a. The court explained that "[b]ecause nothing in the HVIC suggests that its limitation of contractor liability covers statutory violations, * * * the district court did not err in concluding that the HVIC does not provide a defense to damages sought under the FCA." *Id.* at 10a. Particularly in light of Congress's specific focus on "larger-dollar cases aris[ing] out of Department of Defense contracts" when Congress amended the FCA in 1986, the court found it "incongruous that the HVIC would relieve contractors for high-value items from the FCA's damages provision." *Id.* at 13a (citation omitted).

b. The court of appeals held that the government was entitled under the FCA to recover damages for the loss of the helicopter and was not limited to damages equaling the value of the defective gear. Pet. App. 14a-19a. The court observed that FCA remedies are calculated with the goal of "afford[ing] the government complete indemnity for the injuries done it." *Id.* at 14a (citation omitted). The court explained that

> [petitioner] billed the Government for the remanufactured helicopters as units, not as assemblages of assorted parts. The fact that every component but one conformed to contract requirements is not legally significant when the defective gear was "flight critical" and thus necessary for flight. Because the Speco gear was defective, Aircraft 89-0165 was defective, making [petitioner's] entire claim for payment false for the purposes of the FCA.

Id. at 15a (citation omitted).

The court of appeals rejected petitioner's characterization of the requested relief as "consequential dam-

ages." Pet. App. 18a. The court explained that, under established FCA principles, "the Government's damages equal the difference between the market value of Aircraft 89-0165 as received (zero) and as promised." *Ibid.* The court declined "to estimate the market value of a remanufactured helicopter," but instead simply "answer[ed] the question certified for interlocutory appeal in the affirmative—that is, the Government may recover damages under the FCA for the loss of a helicopter that results from the failure of a defective flight-critical component part." *Ibid.*

c. Judge Boggs dissented. Pet. App. 20a-26a. Judge Boggs would have held that, by including the HVIC in the relevant procurement contract, "the Government has agreed that it will not hold the contractors liable under any theory for the value of the helicopter." *Id.* at 21a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 14-22) that the HVIC precludes the government from invoking the remedies available under the FCA. The court of appeals correctly rejected that argument.

a. Under the FCA, petitioner's knowing submission of a false claim for payment rendered it "liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person." 31 U.S.C. 3729(a). That remedial provision "was chosen [by Congress] to make sure that the government would be made com-

pletely whole." *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 551-552 (1943).

As the court of appeals recognized, "[b]ecause nothing in the HVIC suggests that its limitation of contractor liability covers statutory violations, * * * the HVIC does not provide a defense to damages sought under the FCA." Pet. App. 10a. The HVIC implements the federal policy that "[i]n contracts requiring delivery of high-value items, the Government will relieve contractors of *contractual* liability for loss of or damage to those items." 48 C.F.R. 46.803(b) (emphasis added). The terms of the HVIC are drawn from FAR Section 52.246-24(a), which provides (with respect to high-value items) that, "*notwithstanding any other provision of this contract*, the Contractor shall not be liable for loss of or damage to property of the Government" under specified circumstances. 48 C.F.R. 52.246-24(a) (emphasis added). If the HVIC were intended to preclude liability under sources of law other than the contract itself, the italicized language would presumably have read, "notwithstanding any other provision of law."

There is nothing anomalous about a contractual provision that limits the relief available under the contract but does not affect the remedies provided by federal statutes, especially anti-fraud statutes. As the court of appeals explained, "the Government's assumption of the risk that a high-value item such as Aircraft 89-0165 may be lost or damaged after acceptance as a result of a defect or deficiency in the item * * * does not necessarily imply that the Government has self-insured for the damages that result from violations of federal law." Pet. App. 6a-7a. The distinction between contractual and statutory remedies makes particular sense with respect to the FCA, which requires proof that the de-

fendant *knowingly* submitted a false claim to the United States. The government should not be presumed to have agreed to act as a self-insurer for a private party's fraud absent very clear contractual language to that effect. Construing the HVIC in the manner that petitioner advocates would also undermine Congress's efforts, in amending the FCA in 1985 and 1986, to combat fraud in military contracting.[2] See *id.* at 13a ("Given Congress's explicit recognition while amending the FCA that a large number of fraud cases and many of the larger-dollar cases arise out of Department of Defense contracts, it [would be] incongruous that the HVIC would relieve contractors for high-value items from the FCA's damages provision.") (citation and internal quotation marks omitted).

b. Petitioner contends (Pet. 15-19) that the court of appeals' holding conflicts with the decisions of the Eighth and Fourth Circuits in *United States* v. *United*

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[2] In 1985, Congress mandated the award of treble (rather than double) damages in any FCA case involving "a false claim related to a contract with the Department of Defense." See Defense Procurement Improvement Act of 1985, Pub. L. No. 99-145, Tit. IX, § 931(b), 99 Stat. 699; 31 U.S.C. 3729 note. The following year, Congress enacted the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153, which substantially revised the Act "[i]n order to make the statute a more useful tool against fraud in modern times." S. Rep. No. 345, 99th Cong., 2d Sess. 2 (1986). *Inter alia*, the 1986 amendments provided for treble damages in the full range of FCA cases and increased the civil penalties to be awarded for violations; clarified the Act's scienter requirement and its definition of "claim"; expanded the rights of *qui tam* relators and allowed them to recover a somewhat greater share of any monetary award; and enhanced the government's ability to conduct investigations prior to the filing of FCA suits. See H.R. Rep. No. 660, 99th Cong., 2d Sess. 17 (1986); *Cook County* v. *United States ex rel. Chandler*, 123 S. Ct. 1239, 1248 (2003).

States Cartridge Co., 198 F.2d 456 (8th Cir. 1952), cert. denied, 345 U.S. 910 (1953), and *United States* v. *Bankers Insurance Co.*, 245 F.3d 315 (4th Cir. 2001). That claim is incorrect. As the court of appeals in the instant case explained (Pet. App. 10a-13a), those decisions turned on distinctive circumstances not present in this litigation.

United States Cartridge involved a statute that authorized the Secretary of War to build government-owned and government-supervised munitions factories to support the United States' military operations during World War II. Pursuant to that grant of authority, the government contracted with United States Cartridge Co. to build a munitions factory and to produce ammunition. See 198 F.2d at 458. The contract included provisions that insulated the company from liability except in cases involving breaches committed personally by corporate officers or by persons having supervisory authority over the plant as a whole. See *id.* at 461.

The government sued the company under the FCA, alleging that the defendant had presented false claims for payment as a result of its "failure * * * to maintain a proper system of inspection and to produce the quality of ammunition called for by the contract." *United States Cartridge*, 198 F.2d at 458. In holding that the contract precluded the imposition of liability under the FCA, see *id.* at 464-465, the court of appeals emphasized that the contract at issue was a "product of its time and environment," *id.* at 463. The court explained that the company's employees were working on "a Government plant on Government machines, making Government ammunition out of Government raw materials, under Government supervision, and were paid out of Government funds." *Ibid.* The relationship between

the company and the government therefore was not a "conventional relationship," but "an unusual arrangement made to meet a crisis." *Id.* at 464. The court noted that, but for the unconventional character of that relationship, "the Government's argument [in support of FCA liability] might perhaps be unanswerable." *Ibid.*

United States Cartridge and this case involve different procurement contracts entered into more than 40 years apart. The fact that one of those contracts was construed to limit the contractor's FCA liability, and the other to leave that liability unaffected, is scarcely sufficient to establish a circuit conflict. Unlike the United States Cartridge Co., petitioner does not operate a government-owned, government-built, and government-controlled facility. Rather, petitioner itself was responsible for ensuring "the quality of all * * * parts used for the remanufacture [of the helicopters], including those items purchased from its chosen subcontractors." Pet. App. 2a. The court of appeals in this case correctly concluded that those factual differences "suggest that the limitation of liability in *United States Cartridge Co.* allocated risks in a way much more favorable to the defendant than does the HVIC." *Id.* at 12a.

Petitioner's reliance (Pet. 17-18) on *Bankers Insurance* is also misplaced. In *Bankers Insurance*, the court of appeals held that an arbitration clause in an insurance company's contract with the government was properly construed to encompass FCA claims. 245 F.3d at 324. The court emphasized, however, that because the contract provided for *nonbinding* arbitration, its enforcement could at worst delay the Attorney General's pursuit of FCA remedies on behalf of the United States. *Id.* at 322; see Pet. App. 13a. Here, by

contrast, "[petitioner's] interpretation of the HVIC would absolutely foreclose the Government from recouping anything more than a $10,000 civil penalty for damages sustained because of a false claim for a high-value item, when the damages sustained could be far greater than the general $100,000 threshold for such items." *Ibid.* Nothing in *Bankers Insurance* suggests that the HVIC should be construed to effect that untoward result.

c. The policy concerns identified by petitioner provide no basis for this Court's review. Petitioner contends (Pet. 20) that the court of appeals' decision "immediately shifts billions of dollars of risk from the government to private industry," and that "it would be manifestly unfair to allow the government to reap such a windfall at contractors' expense." Petitioner wholly fails, however, to demonstrate the existence of a prior understanding that the HVIC operates to limit a contractor's liability for damages under the FCA. Nor does petitioner explain how the recovery of compensatory damages from a party who knowingly defrauded the government is either unfair or a windfall.

Petitioner also suggests (Pet. 21) that the court of appeals' decision will ultimately disserve the government's interests because companies may now "abandon government contracting" or "raise contract prices to cover the risks" of potential FCA liability. It is highly unlikely, however, that private firms will abandon lucrative defense contracts with the government merely because the HVIC will not insulate them from liability for knowing fraud. Nor is it clear why the government should be concerned if those who would knowingly defraud the United States decide to abandon government contracting. In any event, the task of assessing the risks that petitioner describes, and of weighing

those risks against the danger of increased fraud that might result from the unavailability of FCA remedies in this setting, is entrusted to Congress and the Executive Branch.

2. Petitioner contends (Pet. 22-30) that, even if the HVIC does not altogether bar a damages award under the FCA, the damages authorized by the court of appeals in this case exceed those to which the government is entitled. That claim lacks merit and, in any event, does not warrant this Court's review.

a. In the district court, petitioner contended that under the FCA, "its liability at most was limited to 'the price of a fully-conforming transmission gear,'" Pet. App. 15a (quoting *id.* at 61a), without regard to the value of the helicopter that was destroyed as a direct result of the defective part. The court of appeals correctly rejected that argument. The court explained that because petitioner had "billed the Government for the remanufactured helicopters as units, not as assemblages of assorted parts," the failure of a "flight critical" component rendered the aircraft as a whole defective, "making [petitioner's] entire claim for payment false for the purposes of the FCA." *Id.* at 15a. The government obviously would not be made whole if damages in a case like this one were limited to the cost of the particular component that rendered a much larger item worthless. Although the government through the HVIC has accepted the risk of loss stemming from purely contractual violations in the production of high-value items, it has not relinquished its rights under the FCA and is therefore entitled to the full range of remedies deemed necessary by Congress to ensure complete recovery. See pp. 7-9, *supra.*

b. In the court of appeals and in this Court, petitioner has advanced the less extreme argument that the

government's damages in an FCA case may not exceed "the amount of the claim [for payment], which in this case would be the approximately $4.1 million value of [petitioner's] contract to remanufacture Aircraft 89-0165." Pet. App. 15a; see Pet. 24-25.[3] That contention does not warrant this Court's review, however, because it has no bearing on the proper disposition of the case. So long as the FCA damages in this suit are appropriately measured by reference to the value of the remanufactured helicopter, rather than to the value of the defective gear, the government is entitled under the parties' settlement agreement to recover a predetermined sum, regardless of the precise method that would be used to assess the value of the helicopter if no such agreement existed.

The court of appeals agreed to review two certified questions, one of which was "[w]hether the [Government] can recover damages under the [FCA] for loss of a helicopter resulting from the failure of a defective flight-critical component part." Pet. App. 4a. The parties agreed that, if the court of appeals resolved the two certified questions in the government's favor, petitioner would pay the government an additional $15 million. *Id.* at 3a-4a. Although the court of appeals discussed the legal principles governing computation of FCA damages generally, see *id.* at 16a, it neither "presume[d] to estimate the market value of a remanufactured helicopter," *id.* at 18a, nor remanded the case to the district court for calculation of damages in

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[3] Because the defendant in an FCA case is liable for "3 times the amount of damages which the Government sustains," 31 U.S.C. 3729(a), the maximum FCA award in this case under that method of computation would be approximately $12.3 million plus civil penalties.

accordance with the analysis set forth in the court of appeals' opinion. Rather, having rejected petitioner's contention that the government's damages were limited to the value of the defective *gear*, the court simply "answer[ed] the question certified for interlocutory appeal in the affirmative—that is, the Government may recover damages under the FCA for the loss of a helicopter that results from the failure of a defective flight-critical component part." *Ibid.*

Even if the court of appeals had concluded that the government's damages were limited to the amount ($4.1 million) that petitioner charged for delivery of the remanufactured helicopter, its answer to the first certified question would have been the same. The settlement agreement specifically provided that petitioner would be deemed the prevailing party if the court of appeals held

> that the United States cannot recover damages under the False Claims Act for loss of a helicopter resulting from the failure of a defective flight-critical component part, or that the United States cannot recover damages under the False Claims Act flowing from [petitioner's] claim(s) for payment for the Saudi helicopter that represent the value of the helicopter *(whether it be replacement value, contract value or price, or some other measure) rather than just the value of the defective gear.*

Settlement Agreement para. 2(h)(i) (emphasis added). As the italicized language makes clear, the parties agreed that petitioner would *not* be deemed to have prevailed on the first certified question if the court of appeals held that FCA damages were properly computed by reference to the value of the helicopter rather than to the value of the defective gear, regardless of the

precise measure used to determine the helicopter's value. Thus, even if the court of appeals had held that the government's damages were limited to the "contract value or price" of the helicopter (*ibid.*), in accordance with petitioner's current theory, petitioner would not have prevailed on the first certified question under the plain terms of the parties' agreement. And once the certified questions were answered in the government's favor, the consequence of the parties' agreement was that petitioner was obligated to pay the government $15 million—regardless of what damages award might otherwise have been calculated on the basis of the court appeals' analysis.[4]

c. In any event, petitioner is incorrect in advocating a categorical rule that damages under the FCA can

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[4] Petitioner states (Pet. 25) that the value of a remanufactured aircraft is "possibly as much as $13 million." Petitioner contends (Pet. 30) on that basis that, under the FCA's treble damages provision as construed by the court of appeals, "a supplier that submitted a claim for $4 million to the government for retrofitting an existing aircraft could be found liable for nearly $40 million [*i.e.*, $13 million times three] in damages." The court's decision cannot possibly have that effect in *this* case, however, since petitioner's liability to the government for FCA damages related to Aircraft 89-0165 is limited to $15 million under the terms of the parties' settlement. That sum is somewhat greater than three times the amount of petitioner's claim for payment (see note 3, *supra*), but it is significantly less than the damages that might have been awarded if the case had been remanded for application of the court of appeals' analytic framework to the facts of this case. That disparity simply shows that a broad range of plausible FCA awards continued to exist even after the court of appeals resolved the certified questions. The agreement between the parties that petitioner would pay the government $15 million if the certified questions were answered in the government's favor reflects the parties' decision to compromise rather than litigate within that range.

never exceed the amount of the false claim. As the court of appeals recognized, that argument "conflates market value and contract price." Pet. App. 18a. The court's statement that "the Government's damages equal the difference between the market value of Aircraft 89-1065 as received (zero) and as promised," *ibid.*, is consistent with this Court's decisions. Compare *United States* v. *Bornstein*, 423 U.S. 303, 316 n.13 (1976) (explaining that, under the FCA, "[t]he Government's actual damages are equal to the difference between the market value of the [goods] it received and retained and the market value that the [goods] would have had if they had been of the specified quality"). To the extent that the value of the item purchased by the government exceeds the contract price, nothing in the FCA suggests that the government should be deprived of the benefit of its favorable bargain in calculating damages.

d. Petitioner contends (Pet. 22, 24-25) that the court of appeals' ruling conflicts with the decision in *United States* v. *Aerodex, Inc.*, 469 F.2d 1003 (5th Cir. 1972). In *Aerodex*, a supplier of aircraft engine bearings was held liable under the FCA for double the price of all mislabeled bearings it had sold to the government, but not for certain "consequential damages"—namely, the costs incurred by the government in removing and replacing the bearings, which had been installed in aircraft engines by the time the fraud was discovered. *Id.* at 1010-1011.

As the court of appeals in the instant case recognized, however, petitioner "billed the Government for the remanufactured helicopters as units, not as assemblages of assorted parts." Pet. App. 15a. The remanufactured helicopters under petitioner's contracts are therefore analogous to the bearings in *Aerodex*, for which damages were assessed. Petitioner relies on the

Aerodex court's statement that "a proper application of the [FCA] damage provision limits the government's claim to the amount that was paid out by reason of the false claim." Pet. 22 (quoting *Aerodex*, 469 F.2d at 1011). That statement is best understood, however, as describing the appropriate measure of damages *in that case*, not as establishing a categorical rule. Cf. *Aerodex*, 469 F.2d at 1011 ("*In a case of this kind*, damages under the False Claims Act must be measured by the amount wrongfully paid to satisfy the false claim.") (emphasis added). In any event, because the parties agreed that the government would receive a predetermined sum if the certified questions were resolved in its favor (see pp. 13-16 *supra*), this case is an unsuitable vehicle for deciding what measure of damages would otherwise apply.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The
Supreme Court of the United States

THE BOEING COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA
ex rel. BRETT ROBY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT BRETT ROBY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The Court should deny the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit sought by Petitioner The Boeing Company. There was no error below, and there is no conflict among the circuits. The decisions below are consistent with the decisions of this Court and those from other circuits, as well as the text and history of both the False Claims Act and the High Value Items Clause. Nor does this case raise important or unsettled questions regarding the relationship between the Government and its contractors. Rather, the holdings of the trial and appellate courts in this case show no more than that no company – not even Boeing – is above the law.

STATEMENT OF THE CASE

This case comes before the Court in an unusual posture. The parties settled with Boeing agreeing to pay $61.5 million for its actions. But Boeing insisted, as part of the settlement, upon holding back $19 million of the proceeds while it appealed two adverse rulings against it: First, whether a contractual provision of the Federal Acquisition Regulations immunized it from the reach of the False Claims Act. Second, whether Boeing's damages under the False Claims Act for delivering to the Army a helicopter with a defective flight-critical gear which caused the helicopter to crash and be totally destroyed are limited to the $10,000 cost of the gear. These questions were both answered negatively by the district court and the court of appeals in favor of the United States.

Relator Brett Roby was a Quality Assurance Specialist at SPECO, a now-defunct Boeing subcontractor. Mr. Roby brought this False Claims Act case against Boeing and SPECO after learning that Boeing sold defective CH-47D "Chinook" helicopters to the United States Army and took

steps to prevent information regarding that conduct from finding its way to the United States.

During the 1980s, the Army awarded contracts worth about $2,000,000,000 to Boeing for re-manufacture of about 400 Chinooks. The remanufacturing program was a frame-up rebuild of the helicopters which included new drivetrains containing flight-critical gears manufactured to Boeing specifications from a Boeing-proprietary alloy, "Vasco X2-M."

Boeing subcontracted for SPECO to make the gears. Boeing failed to advise SPECO that Boeing's engineers had actual, specific knowledge of certain metallurgical characteristics of Vasco X2-M which made it an inordinately difficult material to process properly. As a result, SPECO-produced gears often contained defects that created a substantial risk that the gears would crack in service. Cracked flight-critical helicopter transmission gears cause crashes.

When Boeing delivered the rebuilt helicopters to the Army, it falsely certified the aircraft as flight-worthy. In fact, many contained defective SPECO transmission gears. At least two of the Vasco gears exploded while helicopters were in flight as a result of defects which were overlooked by both SPECO and Boeing. Through the course of the litigation, many other gears were found to be defective. The Army grounded that portion of its Chinook fleet with SPECO engine-transmission gears, and as part of the settlement below, such gears were replaced.

As part of a settlement agreement, the district court certified for appeal two questions which were resolved against Boeing by both that court and the court of appeals. Both questions concern whether Boeing can be held liable under the False Claims Act for damages unquestionably sustained by the United States as the result of a crash caused by the failure of a Vasco gear. The crash occurred

in January 1991, during the first Gulf war when a recently-delivered, Boeing-remanufactured Chinook crashed in the Saudi Arabian desert. A defective engine-transmission gear exploded sending shards of the gear into the aircraft and resulting in a fuel-fed fire. Because the helicopter was flying at low altitude, the 18 passengers and crew scrambled off, but two soldiers were injured. The helicopter was a total loss, as was all cargo consisting of a truck, a howitzer, and ammunition.[1]

At the outset, we respectfully urge that the Court not be misled by Boeing's attempts to both distance itself from the failures that caused the crash at issue here, and recast the issues on appeal. The stipulated predicate to the questions certified by the district judge is that sufficient evidence existed that Boeing could, absent prevailing on one or the other of the legal questions certified to the court of appeals, be held liable under the False Claims Act *for any amount of damages beyond the cost of the defective gear*.[2] This being so, the fact that the gear which caused

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[1] Though not the subject of this petition, the United States and Relator Roby also alleged that other Chinook crashes have resulted from these defective transmission gears, including one in 1988 in Honduras, causing the deaths of five American servicemen and the total loss of the helicopter; and one in 1993 during a training mission at Fort Meade, Maryland, resulting in over $1,000,000 in damages to the Chinook.

[2] In the Settlement Agreement between Boeing and the United States, Boeing contracted to pay the reserved settlement amount upon a determination that the United States could recover "damages under the False Claims Act flowing from Boeing's claim(s) for payment for the Saudi helicopter that represent the value of the helicopter *(whether it be replacement value, fair market value, contract value or price, or some other measure)* ***rather than just the value of the defective gear[.]*** Settlement Agreement (attached hereto) at p. 11, ¶ 2.h.i. (emphasis added). *Accord United States ex rel. Roby v. Boeing Co.*, 302 F.3d 637, 640-641 (6th Cir. 2002). This decision is reprinted in Petitioner's

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the crash was made by a subcontractor is irrelevant. Boeing chose and qualified its vendor, specified the exotic gear material, and was responsible for delivery of conforming aircraft. Moreover, Boeing itself contracted to perform annual destructive tests of these vendor-supplied flight-critical gears, but failed to conduct these required tests.

Similarly, Boeing's current claims that the Army "requested" a specific vendor, that the Army "approved" SPECO for this project, and that Army inspectors were "deeply involved" in the quality control process at SPECO (Petition at 9-10) are both irrelevant and misleading. Boeing was no mere assembler, nor was it a disinterested prime contractor which accepted and installed off-the-shelf components while innocent of the problems which plagued their manufacture.

To the contrary, the extensive factual record reflects that Boeing convinced the Army that the flight-critical transmission gears be made from Boeing's proprietary Vasco X2-M alloy. Vasco was not used in gears in previous Chinook models. In fact, this alloy has never been used in any critical aircraft application except these Chinook transmission gears. Boeing engineers participated in the development of the alloy and were painfully aware that it was exceptionally prone to manufacturing defects. Boeing knew that SPECO could not produce conforming Vasco X2-M gears. Boeing located representatives onsite at SPECO, wrote the manufacturing and inspection requirements, knew of problems with grinding burns and cracks on production parts, and knew that SPECO's inspection procedures failed to detect these defects.

Appendix at 1a-26a, and the cited passage appears at 3a-4a. For the Court's convenience, citation to the Sixth Circuit's decision will henceforth be to Petitioner's Appendix ("App.").

Boeing nonetheless installed SPECO gears into many Chinooks – including the one lost in Saudi Arabia – without any inspection of its own. At the same time, Boeing submitted claims for payment which represented to the United States that the helicopters complied fully with all contract requirements.

As a direct, proximate, and foreseeable result of Boeing's representations of conformance, the United States paid Boeing for the helicopters. Then, in reliance upon Boeing's representations of quality, conformance, and airworthiness, the Army flew the helicopters. Once a helicopter containing a cracked transmission gear was put into service, the catastrophic failure of that gear, destroyed helicopter and destroyed materiel were as foreseeable as sunset. The gear in the helicopter which crashed in the Saudi desert was a time bomb. So were the dozens of other defective SPECO gears which Boeing caused to be put into service. Once the gear failed and the helicopter was destroyed, the United States had to, and did, purchase another helicopter to replace it.

The Sixth Circuit correctly observed that "the Speco gear was not simply of lesser quality than specified; it was a defective flight-critical part, which made the loss of [the Saudi helicopter] inevitable." App. at 16a n.7. The panel concluded unanimously that a jury could find Boeing liable for the value of the Saudi Chinook as a means of making the United States "completely whole."[3] It also concluded, over a dissent, that a contractual clause known as the

[3] Boeing's seeming suggestion that the Sixth Circuit was "divided" on all issues before it is wrong. The panel's conclusion that False Claims Act damages can be measured by the value of a helicopter where its loss resulted from a defective flight-critical component part was unanimous; the panel divided 2-1 only on the issue of the HVIC. App. at 20a.

High Value Items Clause ("HVIC") did not confer upon Boeing immunity from the damage provisions of the False Claims Act. Boeing sought rehearing and rehearing *en banc*, which were denied. App. at 103a. This petition followed.

ARGUMENT

I. THERE IS NO CIRCUIT CONFLICT REGARDING THE SIXTH CIRCUIT'S HVIC HOLDING, AND THIS COURT SHOULD DECLINE PETITIONER'S INVITATION TO RESHAPE THE FALSE CLAIMS ACT TO ACCOMMODATE PETITIONER'S COMMERCIAL INTERESTS.

A. The HVIC Is A Contract Term Which Has No Application To An Action Under The False Claims Act.

Boeing asserts that the High Value Items Clause represents a determination by the Department of Defense that it would self-insure for any and all damages resulting from injury to high-value items, no matter the cause. There is a disconnect between Boeing's position and the facts of this case so complete that Boeing has for years either missed it entirely, or been willing to dissemble completely.[4]

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[4] Boeing's claims regarding insurance are merely policy arguments reserved to coordinate branches. More importantly, the Settlement Agreement between Boeing and the United States specifically stipulated that "the exceptions to the High Value Items Clause . . . based on the Contractor having insurance . . . are not at issue." Settlement Agreement at App. 5, ¶ 2a. The question certified by the district court makes no mention whatever of insurance. The fact that Boeing focuses on these policy matters to the exclusion of reasoned analysis eloquently demonstrates that its legal position is bereft.

The fundamental issue is this: The HVIC is a contract clause. To the extent that it operates as a limitation of Government contractor liability, its application is, and could only be, limited to contract-based actions. This is made clear by the express terms of the HVIC itself: "(b) *High-value items.* In contracts requiring delivery of high-value items, the Government will relieve contractors of *contractual liability* for loss of or damages to those items."[5] This passage, which obviously is Boeing's Achilles heel, is studiously ignored in the Petitioner's papers for an obvious reason: This case is not about contractual liability at all.

Rather, this is a False Claims Act case. There is no dispute in the present posture of this matter that the damages which the United States and Relator sought flowed from Boeing's false claims for payment and attendant false certifications of contract conformance. There is, therefore, also no dispute that this case concerns statutory – not breach-of-contract – claims. The FCA provides for recovery against "[a]ny person who" with the requisite intent "submits a false claim for payment" to the United States (31 U.S.C. § 3729(a)(1)) and makes such person liable for all "damages caused by [its] act." 31 U.S.C. § 3729(a). There is, in other words, a manifest distinction between a violation of the FCA – that is, the submission of a false claim for payment – and the violation of law or other misconduct which underlies that violation.[6]

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[5] 48 C.F.R. 46.803 (1997 ed.) (emphasis supplied). This regulatory provision is no mere "policy statement," as Boeing argued in the court below. It is an integral part of the HVIC itself, promulgated by the DoD as the result of legislative rule making.

[6] Consider, for example, the decision in *M/G Transport Servs., Inc. v. Water Quality Ins. Syndicate*, 234 F.3d 974, 978 (6th Cir. 2000) that "[a]n FCA action is not converted into a Clean Water Act action simply because a violation of the Clean Water Act is a predicate to establishing

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Notwithstanding this easily-understood distinction, Boeing repeatedly asserts that the HVIC represents nothing less than a studied decision by the United States to "self-insure" against not only breach-of-contract claims, but also against every possible harm resulting from every conceivable type of fraud and abuse which occurs in the context of execution of a contract for end items that cost more than $100,000. Petition at 14-22. The argument, then, is that an executive-branch contract clause, which by its terms allocates breach-of-contract risk, immunizes the largest defense contractors, who perforce make the most expensive products purchased by the government, from precisely the types of misconduct addressed by Congress in the FCA.

Notably, Boeing nowhere suggests that the HVIC or documents discussing its history or purpose mention its supposed trumping of the FCA, although the latter preceded the former by about a century. Nor does Boeing point to so much as a sentence in the history of the 1986 FCA Amendments or their legislative history indicating that Congress recognized that really big contractors would be immune. The reason for these omissions is simple enough: The HVIC never mentions the FCA, and the FCA

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the falsity of the claim, or may be used as a measure of damages under the FCA." Here, the contract provisions set certain of the standards by which Boeing's conduct is measured. However, the contract is not the source of Boeing's liability. Nor is the basis for the action that the contract was breached. Rather the claim is that by knowingly delivering nonconforming helicopters while certifying their conformance, Boeing submitted false claims. Such conduct is precisely within the terms of the FCA, and simply has nothing to do with the HVIC.

never mentions the HVIC.[7] And when Congress did mention the big contractors, its intent was hardly to let them off the hook.[8]

That being so, Boeing's argument is necessarily reduced to one of repeal (or equally improbable, amendment) by implication – that is, that the HVIC is so broad that its drafters must have intended to expand its reach to Acts of Congress which would otherwise apply. This

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[7] The panel found this point telling, noting that under the HVIC, "The Government is both insurer and insured. Because nothing in the HVIC suggests that its limitation of contractor liability covers statutory violations, we hold that the district court did not err in concluding that the HVIC does not provide a defense to damages sought under the FCA." App. at 10a.

[8] The Senate Report pertinent to the 1986 Amendments observed that "while it may be difficult to estimate the exact magnitude of fraud in Federal programs and procurement, the recent proliferation of cases among some of the largest Government contractors indicates that the problem is severe." S. Rep. No. 345, 99th Cong. 2d Sess. at 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269. The report continued:

> Fraud permeates generally *all Government programs ranging from welfare and food stamps benefits, to multibillion dollar defense procurements*, to crop subsidies and disaster relief programs. While fraud is obviously not limited to any one Government agency, *defense procurement fraud has received heightened attention over the past few years.* In 1985, the Department of Defense Inspector General, Joseph Sherick, testified that *45 of the 100 largest defense contractors, including 9 of the top 10, were under investigation for multiple fraud offenses.* Additionally, the Justice Department has reported that in the last year, four of the largest defense contractors, General Electric, GTE, Rockwell and Gould, have been convicted of criminal offenses while another, General Dynamics, has been indicted and awaits trial.

Id. at 2-3, 1986 U.S.C.C.A.N. at 5267. (emphasis supplied; footnotes omitted). This language hardly supports the contention that the largest contractors are effectively immune from the FCA's grasp.

assertion is, of course, belied by the express language of the HVIC itself. It is also conspicuously inconsistent with this Court's recognition, as recently as this Term, that in the FCA, "Congress wrote expansively, meaning 'to reach all types of fraud, without qualification, that might result in financial loss to the Government.'" *Cook County v. United States ex rel. Chandler*, 538 U.S. ___, ___, 123 S. Ct. 1239, ___, 155 L. Ed. 2d 247, 256-257 (2003), *quoting United States v. Neifert-White Co.*, 390 U.S. 228, 232, 19 L. Ed. 2d 1061, 88 S. Ct. 959 (1968).[9]

While the HVIC is not an Act of Congress, Boeing's argument runs afoul, most fundamentally, of the basic proposition that even where two statutes may seem to conflict, "well-established law ... strongly disfavors preclusion of one federal statute by another absent express manifestations of preclusive intent." *United States v. Sforza*, 326 F.3d 107, ___, 2003 U.S. App. LEXIS 7149, *8-9) (2d Cir., April 10, 2003), *citing, inter alia, United States v. General Dynamics Corp.*, 19 F.3d 770, 774 (2d Cir. 1994), *citing in turn Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976). This Court has long held that preclusion will be found only where there is clear congressional intent to preclude or "positive repugnancy" between the two statutes. *E.g., Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992), *quoting Wood v. United States*, 16 Pet. 342, 363 (1842).

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[9] Even had the Department of Defense intended the HVIC to nullify FCA claims, and there is clearly no evidence to that effect, the DoD was powerless to do so. The Attorney General alone has authority to prosecute FCA offenses. 31 U.S.C. § 3730(a). This is consistent with the Contract Disputes Act, which gives the Attorney General (not the DoD) sole authority over false and fraudulent claims. 41 U.S.C. § 601 *et seq.*

Setting aside the dicey question whether executive rule-making could ever trump an Act of Congress, there is no inherent disharmony between the HVIC and the FCA – much less the sort of statutory cacophony which might lead to a finding of "positive repugnancy." Indeed, both *Sforza* and *General Dynamics* are directly instructive here: The *Sforza* panel recently held that the FCA is not precluded by the Federal Employee Compensation Act, 5 U.S.C. § 8101 *et seq.*, 326 F.3d at ___, 2003 U.S. App. LEXIS at *8-9. And the *General Dynamics* panel held that the False Claims Act is not precluded by the Anti-Kickback Act, 41 U.S.C. § 51 *et seq. General Dynamics*, 19 F.3d at 776-777.

In short, basic rules of construction confirm what common sense suggests: That a procurement regulation cannot credibly be argued to eviscerate an Act of Congress – much less one which it does not even mention. Indeed, the proposition that executive rule-making *sub silentio* insulated the largest contractors from answering for egregious misconduct is, standing alone, richly ironic. It is presumably Boeing's position that only small contractors in less vaunted positions than it should have to trouble themselves to answer for the submission of false or fraudulent claims against the Treasury, while the largest (and, according to Congress, most rapacious) contractors go about their business, beyond the reach of anti-fraud statutes.

As passing strange as Boeing's proposition is when standing alone, it is all the more so when considered against the history and purpose of the FCA. Boeing claims that the DoD, by including the HVIC in its contracts for expensive products, tacitly eviscerated what the Court knows to be "the very Act [Congress] passed to strengthen the Government's hand in fighting false claims." *Cook County*, 155 L. Ed. 2d at 260 (citation omitted). The result

could not be so. The HVIC and the FCA are ships passing miles apart on a foggy night.[10]

B. There Is No Split Of Authority Regarding The HVIC And The FCA.

Boeing posits disarray among the lower courts, asserting that even though the decisions appealed from were the first ever to examine the interplay between the FCA and the HVIC, the Sixth Circuit's decision implicates every "assumption of risk" clause promulgated by the Government – even though all that was ever put at issue was the HVIC. Then, Boeing identifies two cases that (while not dealing with the HVIC) concern limitations on the FCA in contexts much different than that pressed by Boeing in this case.

Boeing's claimed "conflicts" underscore the hollowness of its interpretation of the HVIC. In *United States v. United States Cartridge Co.*, 198 F.2d 456 (8th Cir. 1952), a contractor entered into a wartime procurement contract which made it an "instrumentality of the Government." 198 F.2d at 464. These circumstances dissuaded the court from voiding as against public policy a provision of the contract which waived all the contractor's liability to the government "of any kind whatsoever." *Id.*

The *Cartridge* panel carefully limited its holding to the facts before it, and cautioned against efforts to apply it more broadly:

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[10] Indeed, the case which Boeing identifies as the very DNA of the HVIC, *Australia v. Lockheed Aircraft Corp. & Menasco Mfg. Co.*, Civ. No. 69-1623-WPG (C.D. Cal. Jan. 10, 1972), Petition at 4, makes no mention of FCA liability. Rather, it pertained exclusively to issues of negligence and breach of warranty. These common-law claims have nothing to do with statutory FCA liability.

> If this contract were to be regarded as one creating the conventional relationship between the Government and a commercial corporate contractor not subject to Government supervision and control, for the supplying of goods or services, and if the provisions limiting liability were to be viewed merely as an attempt to relieve such a contractor for liability from its own fraud, the [public policy] argument might perhaps be unanswerable.

Id. Boeing ignores this passage, while spending several pages of its Petition vacillating between the assertion that the wartime-emergency finding was irrelevant to the *Cartridge* decision, and the even more peculiar argument that Boeing really is every bit the "instrumentality of the Government" envisioned by the Eighth Circuit.

These assertions are makeweight. In stark contrast with the facts of *Cartridge*, this litigation involves precisely the "conventional relationship between the Government and a commercial corporate contractor not subject to Government supervision and control." Boeing's helicopter contracts with the United States were indeed "conventional," and were no different from Government contracts for any number of expensive end items. The contracts were unaffected by wartime emergencies: They were let and mostly performed during the peace of the late 1980s. Boeing assuredly was not an "instrumentality of the Government."

The Sixth Circuit thus correctly distinguished *Cartridge* from this case, noting that the factual differences "suggest that the limitation of liability in *United States Cartridge Co.* allocated risks in a way much more favorable to the defendant than does the HVIC." App. at 12a. As it did below, Boeing claims that the "distinction is unavailing." Petition at 16. It argues that the HVIC is an "unqualified limitation-of-liability" clause that is now

included in nearly all Government contracts for high-value defense items, and that its application should not depend on the level of Government control over the contractor. Petition at 17. This argument is both circular (because it ignores the facts of the very case on which it relies) and based on a palpably-faulty premise: The HVIC is by its own terms not an "unqualified limitation-of-liability" clause. It applies only to contract-based claims. Moreover, the HVIC was not even at issue in *Cartridge* (since it was still 20 years away from promulgation). That case dealt with a unique type of Government assumption of risk clause in a unique contract involving an "instrumentality of the Government" tasked with producing ammunition to prosecute a World War. By its own terms, and despite Boeing's contrary assertions, *Cartridge* cannot be unmoored from its facts and broadly applied.

Perhaps recognizing this, Boeing makes a half-hearted stab at comparing its contracts with those in *Cartridge*. (Boeing lays the groundwork for this argument with its carefully distorted "Statement of the Case," which incorrectly paints Boeing as both victim of the acts of its chosen subcontractor and pawn subject to supposed "direction" from the Army). Boeing says that Government supervision of its contracts was "extensive and included the placement of numerous government quality assurance representatives and inspectors at both Speco and Boeing." Petition at 16 n.5. Boeing stops far short, though, of saying that it was somehow an "instrumentality of the Government."[11] The record – even as filtered through Boeing's

[11] In moving for *en banc* review of the Sixth Circuit's panel decision, Boeing was so concerned about the wartime/peacetime distinction in *Cartridge* – as well it should have been – that Boeing actually claimed that this country has been in something of a constant

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myopic lens – comes nowhere near to supporting such a claim.

In the end, Boeing's attempt to cloak itself in the mantle of *Cartridge* is painfully strained. The differences between the facts of that case and this one are so obvious that *Cartridge* merely demonstrates why the HVIC does not provide what Boeing wants – insulation from responsibility for violations of the FCA.

Finally, Boeing claims that the Sixth Circuit's HVIC decision "conflicts" with the Fourth Circuit's decision in *United States v. Bankers Ins. Co.*, 245 F.3d 315 (4th Cir. 2001). Boeing is again mistaken. *Bankers Insurance* did not address the HVIC or even any of the "assumption of risk" clauses that Boeing says are implicated by this case. Instead, it dealt with a mandatory arbitration contract clause, which had the effect of delaying – *not defeating* – a related FCA prosecution. *Id.* at 324. But in enforcing this clause, the Fourth Circuit acknowledged (as Boeing fails to do here) that the FCA was a "unique statutory right." *Id.* at 325. As such, the court noted that its ruling meant only a slight delay to the FCA prosecution, and thus did not dilute the Attorney General's ability to fully enforce the FCA – particularly since the results of the arbitration were not binding on the Government. *Id.* at 324.

In contrast, Boeing's interpretation of the HVIC would render the Attorney General forever precluded from prosecuting Boeing, or any other maker of expensive end items, for appropriate damages under the FCA. *Bankers Insurance* simply does not support this outcome. Indeed, *Bankers Insurance* quite explicitly narrowed its decision – just as did *Cartridge*, the other supposed "conflicting" case

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state of war over the past 60 years. Boeing wisely reconsidered this bit of silly hyperbole, and has chosen not to repeat that claim to this Court.

cited by Boeing – to the facts presented, and thus effectively foreclosed Boeing's current effort to extract a broadly applicable "ruling" from that case.

C. There Is No Support For Boeing's Policy Argument That Contractor Insurance Costs Will Be Affected By The Sixth Circuit's HVIC Ruling.

Many pages of Boeing's petition are consumed by cataclysmic predictions regarding the effect of the Sixth Circuit's HVIC opinion. In sum, Boeing claims that contractors who supply high-value end items to the Government have been relying on the HVIC for decades to shield them from FCA liability – and, as a result, "have foregone the purchase of insurance that would protect them against risk of damage or loss to high value government items." Petition at 19-22. Even more aggressively, Boeing says "it would be manifestly unfair" if the HVIC did not trump the FCA because "the government has avoided significantly higher procurement costs by inducing contractors and subcontractors to forgo the purchase of insurance through a promise of self-insurance." *Id.* at 20-21.

The biggest problem with such assertions is that there is no evidence that they are true. That is, there is no evidence that any Government contractor ever abstained from buying insurance for FCA liability in reliance on the HVIC. Boeing certainly cites none, hoping instead that its thesis gains credibility through repetition. In fact, though, there is clear proof that Boeing never really thought the HVIC saved it from FCA liability: Boeing itself actually had insurance for the FCA claims in this case to the extent that the HVIC did not apply.

Boeing's Chicken Little claims are wholly undercut by a lack of evidence and its own inconsistent behavior. While

Boeing may be correct that the HVIC is one of the Government's efforts to self-insure (at least in connection with breaches of contract), its claim that the Government meant the HVIC to cover *all* manner of loss caused by *all* manner of misconduct – even that which violates Acts of Congress that predate the clause by a century – is simply unsupported on the record. In any event, of course, these are policy concerns reserved to coördinate branches. As the Sixth Circuit noted: "In its brief, Boeing expounds at length on the negative implications, both fiscal and otherwise, of holding military contractors liable under the FCA for damages to high-value items. We agree with the Government and Roby that we should leave any revision of the FCA or the HVIC to Congress." App. at 13a. We respectfully urge this Court's concurrence.

II. THERE IS NO CONFLICT BETWEEN THE SIXTH CIRCUIT'S DAMAGES OPINION AND DECISIONS FROM THIS COURT OR OTHER CIRCUITS.

Regarding the measure of damages under the False Claims Act, Boeing's petition is based principally on its claim that the Sixth Circuit's decision "conflicts" with the Fifth Circuit in *United States v. Aerodex, Inc.*, 469 F.2d 1003 (5th Cir. 1972). Boeing argues that *Aerodex* established a "rule" that FCA damages can never exceed the amount of the underlying false claim. Petition at 22. Boeing also asserts that the Sixth Circuit's decision is "out of step" (though apparently not in "conflict") with this Court's decisions in *United States v. Bornstein*, 423 U.S. 303 (1976) and *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). *Id.*

Boeing is wrong on both counts. Neither the Fifth Circuit in *Aerodex* nor any other court has either established or even hinted at a "rule" restricting FCA damages

in every case to the amount of the false claim. Indeed, *Hess* and *Bornstein*, far from discordant with this case, actually mandate a broad remedial approach to FCA damages so that the Government is made "completely whole." Since there is no Circuit (or any other) conflict, the petition should be denied.

A. Because Boeing Has Recast The Damage Issue On Appeal, The Petition Presents No Case Or Controversy: The Damage Issue Is Moot Because Boeing Concedes That The Government's Damages May Exceed The Value Of The Defective Flight-Critical Gear.

The district judge certified the following question at Boeing's request: "Whether the United States can recover damages under the False Claims Act for loss of a helicopter resulting from the failure of a defective flight-critical component part[.]" App. at 100a. In its Petition, Boeing has markedly rewritten the question:

> Whether the court below erred in holding, in conflict with the United States Court of Appeals for the Fifth Circuit, that damages recoverable under the False Claims Act, before trebling, are not limited "to the amount wrongfully paid to satisfy the false claim[.]"

Petition at (i). The certified question is amplified by the Settlement Agreement between Boeing and the United States, in which Boeing contracted to pay the reserved settlement amount upon a determination that the United States could recover "damages under the False Claims Act flowing from Boeing's claim(s) for payment for the Saudi helicopter that represent the value of the helicopter *(whether it be replacement value, fair market value, contract value or price, or some other measure)* ***rather than***

just the value of the defective gear[.] Settlement Agreement (attached) at App. 9, ¶ 2.h.i. (emphasis added).

Remarkably, the Petition nowhere addresses "the value of the defective gear." Rather, it argues that the Court should grant *certiorari* to decide whether Boeing's liability is limited to the value of "a claim for $4 million." Petition at 30. That Boeing has abandoned the remarkable suggestion that the Government's damage claim was limited to the approximately $10,000 price of the gear is hardly surprising, given Boeing's abandonment of that thesis before the Sixth Circuit[12] and the panel's dismissal of that position as nothing more than "[n]egotiation strategy."

The point, however, is not merely that Boeing's strategy has changed, but that the question presented to this Court is moot. The certified question, in contrast to Boeing's re-tooled version of it, has nothing to do with "the amount wrongfully paid to satisfy the false claim." Boeing's Petition makes no mention of the *price of the gear*; it focuses exclusively on the *value of the claim*. As a result, Boeing presents no question to this Court that would serve to resolve the underlying question before the Court (whether Boeing must pay the reserved settlement amounts), because no matter what answer the Court were to give to the question Boeing now presents, Boeing has conceded that the United States prevails on the certified question. The second question presented, therefore, fails to present a case or controversy, and is moot.

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[12] The panel observed that "Boeing now concedes that damages under the FCA could equal – but never exceed – the amount of the claim, which in this case would be the approximately $4.1 million value of Boeing's contract to remanufacture Aircraft 89-0165." App. at 15a.

B. Boeing Misapprehends FCA Damages Jurisprudence.

Should the Court be inclined to look past Boeing's attempt to completely rewrite the issue presented, it will find Boeing's analysis of False Claims Act damages incorrect. The text of the FCA provides for recovery of three times all "damages which the Government sustains because of the act" giving rise to liability. 31 U.S.C. § 3729(a). As this Court has held time and again over the years, the indisputable goal of FCA damages is to make the United States "completely whole." *Marcus*, 317 U.S. at 552; *Bornstein*, 423 U.S. at 314-15 (*quoting Hess*). Not two months ago, this Court reiterated that "make-whole" damages are an indispensable part of the FCA's broad remedial purpose. *Chandler*, 155 L. Ed. 2d at 258.

Determining proper "make-whole" damages depends on the facts of each case, and courts understand such an approach is not amenable to a one-size-fits-all damages construct. As the Eleventh Circuit said in an oft-quoted holding:

> No single rule can, or should be, stated for the determination of damages under the Act. . . . Fraudulent interference with the government's activities damages the government in numerous ways that vary from case to case. Accordingly, the committee believes that the courts should remain free to fashion measures of damages on a case by case basis. The Committee intends that the courts should be guided only by the principles that the United States' damages should be liberally measured to effectuate the remedial purposes of the Act and that the United States should be afforded a full and complete recovery of all its damages.

United States v. Killough, 848 F.2d 1523, 1532 (11th Cir. 1988) (*quoting* S. Rep. 615, 96th Cong., 2d Sess. at 4

(1982)).[13] This flexibility underlies the rulings in this case and, for that matter, in every case cited in the Petition. FCA damages are based on the facts, and courts rightly frame their inquiry in terms of causation – looking for a way to make the United States "completely whole" for all damage that directly, proximately and foreseeably occurs because of the FCA violation. No court has fashioned a "rule" that constrains this inquiry as a matter of law.

Yet that is exactly what Boeing advocates. Under its view, the FCA is only concerned with "recovering money the government was fraudulently induced to pay," which is capped by the amount of the false claim for payment. Petition at 25. This completely misstates the purpose of the FCA, which by its terms allows for recovery of all damages sustained "because of the act" that violates the statute. As relevant here, the prohibited "act" giving rise to Boeing's liability was its false claim that the Saudi Chinook conformed to all contract requirements. Because of that "act," the Army did more than satisfy the $4.1 million claim from Boeing; it also began flying a helicopter worth far more than $4.1 million which Boeing falsely – and knowingly – represented as flightworthy, but that was in fact doomed to crash after only a few hours of service. Restricting FCA damages as a matter of law to the amount paid on the claim would not make the United States "completely whole."[14]

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[13] Betraying a total failure to grasp this concept, Boeing actually justifies its petition by asking this Court to resolve the "lack of uniformity in the courts concerning the measure of damages under the FCA." Petition at 22. But this is exactly what the FCA demands – a case by case determination of damages. Boeing, understandably, wants a "rule" that reigns in its exposure for violating the FCA.

[14] This Court has recognized that making the Government "completely whole" includes consideration of amounts beyond the false claim

(Continued on following page)

Boeing's own damage analysis has fluctuated wildly as the litigation progressed. Before the district court, Boeing asserted that the "amount wrongfully paid" in connection with the destroyed Chinook was the cost of the defective gear – about $10,000. On appeal, Boeing advocated the same "amount wrongfully paid" position, but conceded that this amount could be the $4.1 million Boeing was paid to rebuild the doomed Chinook. The Sixth Circuit made quick work of this:

> Negotiation strategy aside, we are at a complete loss as to how Boeing can understand "the amount wrongfully paid" to be limited to "the portion of the contract price allocated to the defective gear." According to our reading of the contract and the subsequent invoice, Boeing billed the Government for the remanufactured helicopters as units, not as assemblages of assorted parts. The fact that every component but one conformed to contract requirements is not legally significant when the defective gear was "flight critical" and thus necessary for flight.

App. at 15a. In scrambling to limit its exposure, Boeing simply has not been able to coherently or consistently state its view of damages in this case.

Finally, Boeing tries to undercut the "make whole" language of *Hess* and *Bornstein* and *Chandler*, claiming that the *Hess* Court viewed the measure of double damages (now treble) as the mechanism to make the Government "whole," and was thus not addressing the concept of baseline actual damages. Petition at 23. But *Hess* simply did not make the distinction that Boeing urges, and the reason is obvious: doubling (or trebling) FCA damages will

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such as, for example, investigation costs. *United States v. Halper*, 490 U.S. 435, 442-46 (1989).

make the United States "completely whole" only if determining the appropriate level of baseline damages is part of the "make whole" analysis in the first place.

Indeed, Boeing's effort to undercut the "make whole" language masks the truly-disturbing truth of this case. The Government's total damages as a result of Boeing's misconduct with respect to the placement of exploding Vasco gears in Chinook helicopters is *hundreds of millions of dollars* in lost use of helicopters, repair, replacement, and inspection costs, investigation costs, litigation expense, and morale damage to the troops as a result of the knowledge that they are using equipment not just dangerous, but *unnecessarily* dangerous, and a loss of confidence in the integrity of the aircraft on the part of Army officials responsible for it. Boeing refuses to acknowledge the true measure of the damages it caused.

C. The Unanimous Sixth Circuit Damages Opinion Does Not Conflict With *Aerodex*, And Is Consistent With Precedent From This Court.

Boeing claims there is a Circuit split as to the proper measure of FCA damages because the Sixth Circuit's decision in this case "is in irreconcilable conflict" with a supposed "rule" established by the Fifth Circuit in *Aerodex*. Petition at 24. That "rule," according to Boeing, is that any damages beyond the "amount wrongfully paid" are by definition "consequential damages" and therefore never recoverable. There is no such "rule." Like all the other cases cited by Boeing, and consistent with the FCA text and the "make whole" nature of FCA damages, *Aerodex* simply decided an appropriate level of damages based on the facts presented.

While it is true that *Aerodex* is couched in terms of "consequential damages," close review demonstrates that

it actually is a case which centers around causation.[15] In deciding whether a defendant that shipped defective spare parts had to pay for the removal of those parts after they were installed by the Air Force without any inspection, the Fifth Circuit held that the defendant's violations of the FCA were not the cause of the removal-and-replacement expenses: "The submission of these [false] vouchers," said the court, "was not the cause of the government's consequential damages." *Id.* at 1011. Though the *Aerodex* court precluded the government from recovering (under the FCA) the cost of removing the defective parts, it probably did so because the Air Force was required to inspect the parts prior to installation but failed to do so. Such an inspection would have simply and cheaply revealed the defect in the parts. *Id.* at 1009. This failure readily can be seen as a break in the chain of causation – an intervening or "mediating" cause.

Here, the United States had no duty to tear down the helicopter Boeing sold it to inspect transmission gears, whether before or after delivery, and thus Boeing's attempt to shoehorn this case into the mold of *Aerodex*'s consequential-damage analysis is ill-conceived. *Aerodex* involved a manufacturer of component parts: Boeing is a manufacturer of helicopters. *Aerodex* involved delivery of individual components for later installation into airplanes: Boeing delivered helicopters which it certified as airworthy as delivered, requiring nothing more than a preflight check and a Chinook pilot's expertise.

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[15] Indeed, the Fifth Circuit itself has expressly characterized *Aerodex* as being a case which focuses on "the element of causation between the false statements and the loss." *United States v. Miller*, 645 F.2d 473, 476 (5th Cir. 1981).

Equally improper is Boeing's claim that the Sixth Circuit adopted a boundless "but for" test for determining appropriate FCA damages. Petition at 26. The phrase "but for" never appears in the Sixth Circuit's decision.[16] In truth, after considering the facts presented, the Sixth Circuit decided that the best method to make the United States "completely whole" was the "diminished-value" measure of FCA damages that Boeing itself advocated and this Court applied in *Bornstein*. App. at 18a. Since Boeing sold helicopters, not gears, the Sixth Circuit held that the Government could recover the difference between the market value of a helicopter delivered with a defective flight-critical gear ($0) and the value the entire aircraft "would have had if it had been of the specified quality[ ]" – a figure not identified because the court was only asked to decide whether such amount was a *candidate* for proper damages in this case. *Id.* at 18a. Thus, Boeing simply does not like how the Sixth Circuit *applied* the *Bornstein* measure of damages.

Boeing now says the Sixth Circuit improperly extended the *Bornstein* "rule," claiming that no other court has ever held that "a supplier of remanufacturing services

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[16] Having misstated the Sixth Circuit's holding, Boeing then claims that courts beyond *Aerodex* have "consistently rejected" the Sixth Circuit's "expansive" decision. Petition at 26. Interestingly, the only case Boeing cites, *United States v. Hibbs*, 568 F.2d 347 (3d Cir. 1977), actually undercuts Boeing's petition because its analysis is framed around causation. The Third Circuit reasoned that the connection between actual damage and the "act" of the defendant "compels consideration of the element of causation. *That requirement should be liberally construed so as to provide the government restitution from those whose fraud has caused loss.*" *Id.* at 351 (emphasis added). The *Hibbs* court also held that this inquiry requires consideration of "the relationship between the unlawful act and the injury ultimately sustained." *Id.*

and upgraded components could be liable under the FCA for three times the value of an entire aircraft if a single upgraded part is defective." Petition at 23.[17] The fact is, though, that no other court has ever been confronted with the situation at hand. That is, Boeing cannot demonstrate that the United States has ever before been the victim of a contractor who sold it an aircraft after failing to take steps to ensure that flight-critical parts had been manufactured free of defects, the risk of which the contractor specifically knew. Boeing's conduct in this case is so far from the mainstream of acceptable conduct that the fact there is no comparable case is hardly surprising. It proves nothing for Boeing to claim that the Sixth Circuit decision is "at odds with every court that has addressed these issues." *Id.* at 23. No court save the Sixth Circuit (and the District Court) has done so.

More to the point, Boeing is simply incorrect that *Bornstein* established a "rule" that the Sixth Circuit somehow ignored. Far from restricting the FCA, *Bornstein* actually reaffirmed the "make whole" measure of FCA damages. *Bornstein*, 423 U.S. at 314, *quoting Hess*, 317 U.S. at 551-552. As for its specific holding, there was no need for the *Bornstein* Court to address damage done to an end-item as a result of a defective component for an obvious reason: Nothing happened as the result of the sub-standard radio tubes because the Government detected the fraud before any adverse consequences arose.

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[17] Boeing also claims that the Sixth Circuit's application of *Bornstein* is "absurd" because the court set the market value of the defective helicopter at zero. Petition at 30 n.14. The Sixth Circuit was being generous. The value of a helicopter carrying American troops and equipment that will soon crash without warning and burn to the ground is, we respectfully submit, far less than zero.

Bornstein, 423 U.S. at 307. There is no indication whatever in that Court's opinion that, had the faulty tubes caused the radios to catch fire and burn to cinders as soon as they were turned on, their full value would not have been recoverable. In claiming the exact opposite, Boeing extracts a holding that just isn't there.[18]

Returning to *Aerodex*, Boeing argues that what it considers the "rule" of that case is the will of Congress. Petition at 26-28. This assertion does not withstand scrutiny. Congress did set out to reverse the consequential-damage language from *Aerodex* as a "narrow and form-bound interpretation" of the FCA, S. Rep. No. 345, 99th Cong., 2nd Sess. (1986) at 19, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5284, and the initial versions of the amended FCA thus did include a provision allowing for "consequential damages." Congress characterized "consequential damages" as follows:

> (1) For purposes of this section, consequential damages include damages which the United States would not have sustained but for –
>
> (A) the commission of any of the acts prohibited by subsection (a); or
>
> (B) entering into or making any contract or grant as a result, in any material part, of any false statement, record, or claim.

H.R. 4827, § 2, *reprinted in* 99 Cong. Rec. H6474 (Daily Ed. September 9, 1986).

This language was removed from the bill during the course of Conference Committee proceedings, and replaced

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[18] In fact, *Bornstein* actually allowed FCA damages that *exceeded the amount of the false claims*, 423 U.S. at 307, and thus Boeing's reliance on *Bornstein* for its "amount wrongfully paid" analysis is unfathomable.

with the language which now appears in the FCA – "three times the amount of damages which the Government sustains because of the act" of the defendant. 31 U.S.C. § 3729(a). The legislative history is silent with respect to the reasons for that removal. However, the extended remarks of an opponent of the draft provision are revealing in terms of understanding why the Conference Committee acted as it did:

> As reported by the committee, the definition of consequential damages is far too sweeping. From a fairness standpoint, *assessments of damages should be limited to those which were proximately caused by a prohibited act, and which were reasonably foreseeable.* Both of these concepts are well defined in the common law and, consequently, can be readily applied by the courts. In the absence of such limitations, persons may be subject to penalties based on highly speculative, attenuated and subjective considerations.

Extended remarks of Rep. Brown, *reprinted in* 99 Cong. Rec. H6474 (Daily Ed. September 9, 1986) (emphasis supplied). Representative Brown was the only Member to speak against the consequential damage language in the bill, and there is thus no better indication in the legislative record regarding why the compromise bill which emerged from the Conference did not include that provision. Rather, it appears a determination was made that while "consequential damages" should not be available under FCA treble damage remedies, the Act would be interpreted based on the well-understood concepts of proximate causation and foreseeability.

This interpretation simply makes good sense. It reconciles the problems which characterization and computation of "consequential damages" may pose, with the over-arching goal of the Act – to make the United States

"completely whole" for its losses. Thus, while *Aerodex* has become a talisman for the proposition that "consequential damages" are not recoverable under the 1986 Amendments, Boeing's suggestion that its precise holding has become the law of the land simply does not square with the cases.[19] To the contrary; the Second Circuit squarely held that consequential damages *are* recoverable under the False Claims Act in *General Dynamics*, 19 F.3d at 777, and other courts have without hesitation approved damage amounts exceeding contract price.[20]

Boeing suggests in closing that companies will stop doing business with the United States if this Court does not reverse the Sixth Circuit's ruling that Boeing could be held liable for the value of the helicopter. Petition at 30. Relator Brett Roby, who stood up for the principle that no contractor is above the law when he started this lawsuit almost ten years ago, respectfully submits that if Boeing truly understood the responsibilities it undertook when it signed its contracts with the United States, it would focus not on ending its relationship with the United States, but on reforming the practices which led to its submission of false claims to the United States. Had it done so before these helicopters were delivered, there would have been no dispute at all.

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[19] Indeed, Boeing points to no post-1986 court that has interpreted the consequential damage issue in a way which deprives the United States of the full measure of damages caused by the defendant's violations of the False Claims Act.

[20] *E.g., Commercial Contractors. Inc. v. United States*, 154 F.3d 1357, 1371-72 (Fed. Cir. 1998); *BMY-Combat Systems Division of Harsco Corporation v. United States*, 44 Fed.Cl. 141, 148 (Ct. Cl. 1998).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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SETTLEMENT AGREEMENT

This Settlement Agreement ("Settlement Agreement") is made and entered into as of the 3rd day of August, 2000, by and between the United States of America, acting through the Civil Division of the Department of Justice ("United States"), and The Boeing Company ("Boeing"), a Delaware corporation (United States and Boeing being referred to herein collectively as "the Parties").

WHEREAS, an action entitled "*United States ex rel. Roby v. The Boeing Company*," now pending in the United States District Court for the Southern District of Ohio ("District Court"), Case No. C-1-95-375 (the "Speco Action"), was filed by Brett Roby, as relator on behalf of the United States ("Relator"), which made certain allegations of False Claims Act violations against Boeing;

WHEREAS, the United States intervened in the Speco Action and filed a First Amended Complaint against Boeing (the "Speco Complaint");

WHEREAS, an action entitled "*United States ex rel. Roby v. Litton Industries and The Boeing Company*," now pending in the United States District Court for the Southern District of Ohio, Case No. C-1-97-410 (the "Litton Action"), was filed under seal by Brett Roby as relator on behalf of the United States, which made certain allegations of False Claims Act violations against Boeing;

WHEREAS, the Relator has filed under seal a First Amended Complaint in the Litton Action (the "Litton Complaint");

WHEREAS, the United States has intervened in the Litton Action and filed a complaint asserting claims relating to the CH-47D 85-24332 mishap that occurred on

December 8, 1988 in Honduras ("United States' Litton Complaint"), and Boeing will, simultaneously with the execution of this Settlement Agreement, file its answer to the United States' Litton Complaint;

WHEREAS, the Litton Action, Litton Complaint, Speco Action, Speco Complaint, and United States' Litton Complaint (collectively "the Litton and Speco Actions and Complaints") include allegations of False Claims Act violations, common law fraud, breach of contract, unjust enrichment and payment by mistake claims in connection with the provision of Vasco X2M spiral bevel transmission gears under Boeing's contracts with the United States Army for new and remanufactured Chinook CH-47D and MH-47D/E helicopters;

WHEREAS, Boeing denies all the allegations advanced in the Speco and Litton Actions and Complaints and maintains that it did not submit false claims to the government or engage in any conduct in violation of law or of its contractual obligations as alleged in the Speco and Litton Actions and Complaints;

WHEREAS, the Parties now mutually desire to reach a resolution of the allegations and claims asserted by the United States in the Speco and Litton Actions and Complaints;

WHEREAS, the Parties now mutually wish to avoid to the greatest extent possible the expense, delay and inconvenience of protracted litigation but agree to preserve for appellate review certain issues relating to damages available under the False Claims Act and the applicability of the High-Value Items Clause to False Claims Act claims; and

WHEREAS, Boeing has expressed its willingness to enter into a contract modification intended to make it possible for the United States Army to replace in the Chinook CH-47D and MH-47D/E aircraft engine and combiner transmissions Vasco X2M spiral bevel gears manufactured by Speco Corporation during the period of about 1986 through 1995;

WHEREAS, simultaneously with the execution of this Settlement Agreement, Boeing and the United States Army have executed an Agreement and Release in which Boeing waives or releases its right to make certain claims pertaining to the more than $3,395,000 in costs that Boeing incurred or has agreed to incur as a result of the 1999-2000 reinspection and evaluation efforts by the Army and Boeing of the spherical raceways of Army-owned first- and second-stage planet gear/bearing assemblies.

NOW, THEREFORE, for an inconsideration of the mutual covenants, conditions and promises contained herein, the releases contained herein, and other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereto agree as follows:

1. *Contract Price Adjustment and Working Capital Fund Payment.* For purposes of settlement, concurrently with and as a condition to the execution of this Settlement Agreement, Boeing will enter into a contract modification covering the contracts with the United States Army set forth in Appendix A providing for an aggregate price adjustment pursuant to the contract modification to be made in the form of a check made payable to the Treasurer of the United States in the amount of $23,950,000 within five (5) days after the later of the Court's entry of the Order referred to in paragraphs 2(a) and (b) and the

Orders of dismissal referred to in paragraph 2(i). Additionally, Boeing will make a payment to the Department of Justice Working Capital Fund to be made in the form of a check payable to the Treasurer of the United States in the amount of $1,050,000 within five (5) days after the later of the Court's entry of the Order referred to in paragraphs 2(a) and (b) and the Orders of dismissal referred to in paragraph 2(i).

2. *Dismissal of Certain Claims and Further Relief Contingent On Resolution of Specified Issues on Appeal.*

a. Concurrent with execution and delivery of this Settlement Agreement, and conditional upon Boeing executing the contract modification set out in paragraph 1 above, the Parties will submit to the Court an agreed-upon proposed Order, attached hereto as Appendix B ("Order"), pursuant to which the District Court will certify for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) the Court's Orders of November 2, 1999 and December 30, 1999 and the order denying Boeing's Motion to Reconsider in Part the Court's Order of December 30, 1999, which will set forth the following two specific and exclusive issues of law (hereinafter the "Two Damages Issues"):

In August 1990, pursuant to a contract to remanufacture CH-47D helicopters for the Army, Boeing delivered a remanufactured CH-47D helicopter to the Army and submitted a claim(s) for payment to the Government for the re-manufactured helicopter. Between delivery and January 1991, the helicopter flew 56 flight hours. On January 11, 1991, a defective flight-critical transmission gear failed resulting in the helicopter being destroyed. A new CH-47D helicopter was purchased from Boeing to replace the destroyed helicopter.

Assuming arguendo that the necessary elements of the False Claims Act are satisfied, the following questions of law arise:

i. Whether the United States can recover damages under the False Claims Act for loss of a helicopter resulting from the failure of a defective flight-critical component part; and

ii. Whether the High-Value Items Clause contained in the Federal Acquisition Regulations § 52.246-24 and incorporated in the Boeing CH-47D helicopter contract operates as a defense to damages sought under the False Claims Act for the loss of or damage to a helicopter resulting from the failure of a defective component part.

The Parties agree that resolution of these two questions of law do not involve disputed issues of fact.

For purposes of this appeal only, the Parties agree that: i) the loss of the helicopter was the result of the failure of the defective flight-critical transmission gear; ii) they will not argue to the reviewing courts that there needs to be any additional fact-finding on the Two Damages Issues; iii) the exceptions to the High-Value Items Clause, found at F.A.R. § 52.246-24(b) and (c) (April 1984), based on the Contractor having insurance or there being willful misconduct or lack of good faith on the part of any of the Contractor's managerial personnel, are not at issue; iv) the version of the False Claims Act in effect at the date of this Settlement Agreement and the version of the High-Value Items Clause incorporated into the helicopter contracts, F.A.R. § 52.246-24 (April 1984), shall govern this appeal; and v) the

helicopter at issue is a high-value item under the High-Value Items Clause.

b. This settlement is contingent on the District Court issuing the proposed Order certifying the Two Damages Issues for appeal pursuant to 28 U.S.C. § 1292(b). Accordingly, if the District Court declines to enter the agreed upon Order, this Agreement is, and the contract modification identified herein shall be, null and void.

c. If the District Court enters the agreed upon Order, this settlement is contingent on the United States and the Relator supporting a Petition filed by The Boeing Company to the Sixth Circuit Court of Appeals, seeking review of the Two Damages Issues pursuant to 28 U.S.C. § 1292(b). If either the United States or the Relator fails to support the Petition for review, this Agreement is, and the contract modification identified herein shall be, null and void. The United States specifically hereby agrees to advise the Sixth Circuit that the two certified questions of law are important and controlling issues of law, and that appellate resolution of these questions on the merits will terminate the litigation. Once the Sixth Circuit accepts jurisdiction, the Parties agree to use their best efforts to obtain a ruling on the merits of the questions certified.

d. If the Sixth Circuit Court of Appeals declines to accept jurisdiction of the interlocutory appeal under § 1292(b), the matter shall be returned to the District Court for a trial limited to the False Claims Act claim in the Speco Complaint seeking damages for the CH-47D helicopter 89-00165 that was destroyed in Saudi Arabia on January 11, 1991 ("the Saudi Helicopter False Claims Act Claim"). Boeing agrees to waive any rights to any

offset, set-off, credit, or contribution for (1) any amounts received by the United States from Boeing under paragraph 1 of this Agreement; and any amounts, fees and expenses paid pursuant to 31 U.S.C. § 3730(d) related thereto; and (2) any amounts received by the United States from the Speco Corporation, or its estate, in the past, present, or future, for any damages awarded to the United States by a Court relating to the Saudi Helicopter False Claims Act Claim.

e. If the Sixth Circuit accepts review, the Parties agree as follows:

   i. If, at the completion of all appeals, Boeing is deemed to be the prevailing party as set forth in paragraph 2(h) below, the Saudi Helicopter False Claims Act Claim will be voluntarily dismissed by the United States with prejudice.

   ii. If, at the completion of all appeals, Boeing is not deemed to be the prevailing party, as set forth in paragraph 2(h) below, The Boeing Company, for purposes of settlement, agrees to enter into a similar contract modification with the United States Army, as required in paragraph 1 above, and using a then open contract(s) with Boeing chosen by the United States and providing for a price adjustment pursuant to the contract modification to be made in the form of a check made payable to the Treasurer of the United States in the amount of $14,430,000. Additionally Boeing will make a payment to the Department of Justice Working Capital Fund to be made in the form of a check payable to the Treasurer of the United States in the amount of $570,000. Said amounts will accrue interest

in accordance with Federal Acquisition Regulation 52.232-17 from the date the District Court enters the agreed upon Order identified in paragraphs 2(a) and (b). Upon payment of such amount, the Saudi helicopter False Claims Act Claim will be voluntarily dismissed by the United States with prejudice.

f. If the Sixth Circuit Court of Appeals accepts jurisdiction, but fails to decide on their merits the Two Damages Issues on appeal identified in paragraph 2(b) above, and no further appeal is taken, the matter shall be returned to the District Court for trial limited to the Saudi Helicopter False Claims Act Claim. If the Court of Appeals does not rule for Boeing on at least one of the Two Damages Issues on appeal and does not rule against Boeing on both of the Two Damages Issues on appeal, as set forth in paragraph 2(h) below, it will be deemed that the Court of Appeals did not decide the Two Damages Issues on appeal.

g. Either party may petition for writ of certiorari from the United States Supreme Court of any adverse ruling from the Sixth Circuit Court of Appeals. If the Writ is granted, the determination of whether Boeing is or is not the prevailing party in the Supreme Court will be determined in accordance with paragraph 2(h) below.

h. *Determination of the prevailing party.* For the purpose of determining whether Boeing is or is not the prevailing party under paragraphs 2(e), (f) and (g) above, the Parties agree as follows:

i. Boeing will be deemed the prevailing party if the Sixth Circuit (or if certiorari is granted, the Supreme Court) either (a) reverses the

District Court's Order of December 30, 1999 by holding on the legal issue that the United States cannot recover damages under the False Claims Act for loss of a helicopter resulting from the failure of a defective flight-critical component part, or that the United States cannot recover damages under the False Claims Act flowing from Boeing's claim(s) for payment for the Saudi helicopter that represent the value of the helicopter (whether it be replacement value, fair market value, contract value or price, or some other measure) rather than just the value of the defective gear; or (b) reverses the District Court's Order of November 2, 1999 by holding on the legal issue that the High-Value Items Clause operates as a defense to damages sought under the False Claims Act for the loss of or damage to a helicopter resulting from the failure of a defective component part.

ii. On any of the Two Damages Issues, taken and decided on the merits by the United States Supreme Court, the Supreme Court ruling shall control on that issue. On any of the Two Damages Issues, not taken or not decided, on the legal issues presented by the Supreme Court, the Sixth Circuit Court of Appeals' ruling shall control on that issue. If at the end of all appeals, any such combination of rulings by the Supreme Court and the Court of Appeals does not result in a ruling for Boeing on the merits in at least one of the Two Damages Issues, and does not result in a ruling against Boeing on the merits in both of the Two Damages Issues, as set forth in paragraph 2(f) above, the matter shall be

returned to the District Court for a trial limited to the Saudi Helicopter False Claims Act Claim.

iii. If, at the end of all appeals, the Parties cannot agree if Boeing has prevailed or not prevailed as set forth in this paragraph, the District Court for the Southern District of Ohio, Western Division, will retain jurisdiction: (1) to determine if Boeing has prevailed; (2) to determine if Boeing has not prevailed; or (3) to proceed with trial of the matter limited to the Saudi Helicopter False Claims Act Claim. The Parties retain the right to appeal that determination.

i. Concurrent with execution and delivery of this Settlement Agreement, and conditional upon Boeing executing the contract modification set out in paragraph 1 above and the District Court entering the proposed Order attached at Appendix B, the Parties will execute Stipulations and Orders providing for dismissal, with prejudice to the Relator, of all claims in the Litton Action and the Litton Complaint against all defendants, with prejudice to the Relator and the United States of all claims in the United States' Litton Complaint against all defendants, and with prejudice to the United States and the Relator of all claims in the Speco Action and in the Speco Complaint except for the Saudi Helicopter False Claims Act Claim, which Orders the Parties will request that the Court enter simultaneously with the proposed Order attached at Appendix B.

3. *Releases by United States*. Upon execution of this Agreement, the United States and its agencies, employees, representatives, and assigns ("the United States") hereby

waive, release, and promise to refrain from instituting, maintaining, or causing to be instituted or maintained

a. any civil action, claim, adjustment, set-off, or administrative monetary proceeding against Boeing, its past, present or future officers, directors, employees, agents, subsidiaries, affiliates (including but not limited to Boeing Precision Gear, Inc.), representatives, successors, or assigns, either in their corporate or personal capacities, and Litton Industries, Inc., its past, present, or future officers, directors, employees, agents, subsidiaries, affiliates (including but not limited to Litton Precision Gear), representatives, successors, or assigns, either in their corporate or personal capacities (collectively the "Releasees"), which the United States has or may have against Releasees under the False Claims Act, 31 U.S.C. §§ 3729 *et seq.*, the Contract Disputes Act, 41 U.S.C. §§ 601 *et seq.*, the Civil Major Fraud Act, 18 U.S.C. § 1031(h), the Civil Anti-Kickback Act, 41 U.S.C. § 55, the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801 *et seq.*, and under any common law or equitable theories including fraud, breach of contract, unjust enrichment or payment by mistake, for the conduct alleged by the United States in the United States' Litton Complaint including for the aircraft mishap at Honduras on December 8, 1988, and all such claims for the conduct alleged in the Speco Action and the Speco Complaint except for the Saudi Helicopter False Claims Act Claim;

b. any civil action, claim, adjustment, set-off, or administrative monetary proceeding against the Releasees which the United States has or may have against the Releasees under the False

Claims Act, 31 U.S.C. §§ 3729 *et seq.*, the Contract Disputes Act, 41 U.S.C. §§ 601 *et seq.*, the Civil Major Fraud Act, 18 U.S.C. § 1031(h), the Civil Anti-Kickback Act, 41 U.S.C. § 55, the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801 *et seq.*, and under any common law or equitable theories including fraud, breach of contract, unjust enrichment or payment by mistake, premised on any of the Vasco X2M spiral bevel gears, part numbers 145D5305, 145D5306, 145D6301 and 145D6302 manufactured through March 31, 2000, it being agreed that the release in this paragraph does not extend to a mishap, the cause of which is a part or parts other than any of the four part numbers identified in this paragraph;

c. any civil action, claim, adjustment, set-off, or administrative monetary proceeding against the Releasees which the United States has or may have against the Releasees under the False Claims Act, 31 U.S.C. §§ 3729 *et seq.*, the Contract Disputes Act, 41 U.S.C. §§ 601 *et seq.*, the Civil Major Fraud Act, 18 U.S.C. § 1031(h), the Civil Anti-Kickback Act, 41 U.S.C. § 55, the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801 *et seq.*, and under any common law or equitable theories including fraud, breach of contract, unjust enrichment or payment by mistake, premised on the allegation that Vasco X2M is an inherently unsafe or unsuitable material for use for the manufacture of CH-47 or MH-47 components, it being agreed that the release in this paragraph does not release the Releasees from any liability relating to the design (apart from material choice and the use of the material in conformity with the design), quality oversight, or manufacturing and processing of parts made of

Vasco X2M other than the claims released for the four parts identified in paragraph 3(b) and the claims released in paragraph 3(a).

4. *Exclusions*. The Parties agree that the following are excluded from this Settlement Agreement, the dismissal set forth in paragraph 2 above and the releases set forth in paragraph 3 above: (a) liability, if any, the Releasees have or may have for delivery of any deficient product or parts, or for breach of any express or implied warranty, including injury to persons and property, or any other claims the Parties may have regarding the contracts between them, excepting therefrom the claims released in paragraph 3 above; (b) any disputes or claims between the Parties arising under the Internal Revenue Code or Internal Revenue Service Regulations or under Securities or Environmental laws; (c) any administrative matter relating to the suspension or debarment by any federal agency of the Releasees; and (d) disputes and claims for the enforcement of this Settlement Agreement.

5. *Cost Allowability*. Boeing agrees that all costs, as defined by FAR § 31.205-47(a), incurred by, for, or on behalf of Boeing, its affiliates, subsidiaries, officers, directors, agents, representatives, and employees relating to (a) the matters covered by this Settlement Agreement; (b) the government's audit and investigation of the matters covered by this Settlement Agreement; (c) Boeing's investigation and defense of the matters and corrective actions if any; (d) the negotiation of this Settlement Agreement; (e) the amounts, fees and expenses paid pursuant to 31 U.S.C. § 3730(d) relating to the cases settled herein, (f) matters relating to the Boeing Releasees responding to the 1999 Department of Defense Inspector General subpoenas pertaining to planetary gears, and (g)

costs of the payments referred to in paragraphs 1 and 2(e)(ii) above, shall be treated as unallowable for government contract accounting purposes. These amounts shall be separately accounted for by Boeing by identification of costs incurred through (1) accounting records to the extent possible; (2) memorandum records including diaries and informal logs, where accounting records are not available; and (3) good faith itemized estimates, where no other accounting basis is reasonably available. Any such costs previously submitted or treated by Boeing as an allowable cost for government accounting purposes shall be withdrawn, and any charge or charges previously submitted that were based on such costs shall be adjusted accordingly, and any refund or credit due the United States as a result will be paid or given promptly.

6. *Federal Tax Deductibility*. Boeing further agrees that costs of the payments referred to in paragraphs 1 and 2(e)(ii) above will not be taken as a federal tax deduction by Boeing. Except for the foregoing, nothing in this Settlement Agreement is intended to characterize the federal tax deductibility of any other matter pertaining to this Settlement Agreement.

7. *No Admissions*. Nothing in this Settlement Agreement is intended to constitute an admission or finding of liability by any of the Releasees, each of which denies any fault or liability by it.

8. *Authority*. Boeing and the United States each warrant and represent that their representatives, whose signatures appear below, have the authority to execute this Settlement Agreement and to bind Boeing and the United States to every promise or covenant contained in this Settlement Agreement.

9. *Binding Upon Parties.* This Settlement Agreement will be binding upon and inure to the benefit of Boeing and the United States, and their employees, officers, agents, servants, attorneys, representatives, and, in the case of Boeing, its directors and shareholders. This Settlement Agreement will also inure to the benefit of Litton Industries, SKF U.S.A., Inc., and MRC Bearing Company. The Parties agree that the Settlement Agreement does not waive, compromise, or release any claims or causes of action against any other person or entity not identified in this Settlement Agreement.

10. *Counterparts.* The Parties have executed two identical copies of this Settlement Agreement, which may be executed in counterparts, each of which shall be deemed an original which will be fully enforceable.

11. *Changes.* The Parties agree that this Settlement Agreement may not be altered, amended, modified, or otherwise changed except by a writing duly executed by both Boeing and United States.

12. This Settlement Agreement shall be construed as if the Parties jointly prepared it and any uncertainty or ambiguity shall not be interpreted against any one Party.

13. This Settlement Agreement shall be interpreted in accordance with federal law. The District Court shall retain jurisdiction over this case for the purpose of resolving any disputes under the Settlement Agreement until such time as the Saudi Helicopter False Claims Act Claim is dismissed with prejudice pursuant to paragraphs 2(e)(i) or 2(e)(ii) above, or until any potential appeals pursuant to paragraph 2 above are exhausted and final judgment is entered on the Saudi Helicopter False Claims Act Claim.

IN WITNESS WHEREOF, this Settlement Agreement has been executed as of August 3, 2000 the date first above written.

THE UNITED STATES OF AMERICA:

By /s/ Dennis L. Phillips

Date August 3, 2000

U.S. Department of Justice
Attorney for the Plaintiff United States

THE BOEING COMPANY:

By /s/ John W. Wallace

Date August 3, 2000

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No. 02-1411

IN THE

Supreme Court of the United States

THE BOEING COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA *EX REL.* BRETT ROBY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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May 27, 2003

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2 PP

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the Chamber of Commerce of the United States of America ("the Chamber") requests leave to file the accompanying *amicus curiae* brief in support of the petition for a writ of certiorari. Respondent United States and Petitioner, The Boeing Company, consented to the filing of this brief. Respondent Roby did not.

As set forth in the accompanying brief, the Chamber represents more than 3 million businesses and business organizations of every size, industrial sector, and geographic region. The Chamber often participates as *amicus curiae* in cases that raise issues of vital concern to the Nation's business community. This is such a case.

This case concerns the proper measure of damages under the False Claims Act. Because the Sixth Circuit's decision would permit the Government to recover consequential damages under the False Claims Act, the Chamber is concerned that businesses that do business with the Government may be exposed to damages well in excess of what Congress intended when it enacted the 1986 Amendments to the False Claims Act. In addition, the Chamber is concerned that, to the extent that the Sixth Circuit's decision allows the Government to recover consequential damages under the guise of direct damages, it unwittingly invalidates consequential damages exclusions in hundreds of commercial contracts. Because of its unique position in the business community, the Chamber is able to show the Court that this case is critical not only to Boeing but also to countless other contractors and businesses.

Moreover, when the Chamber declined to file a brief on behalf of Boeing below, Roby's counsel argued to the Sixth Circuit that Boeing could not get the Chamber "to support [Boeing's] stilted legal views . . ." Relator Brett Roby's Opposition to the Motion by Aerospace Industries Association of America, Inc. for Leave to File Brief as Amicus Curiae in Support of Boeing's Petition for Rehearing En Banc at 10 n. 14, *United States ex rel. Roby v. Boeing*, 302 F.3d 637 (6th Cir. 2002). Thus, a second reason for seeking leave to file this brief is to show that, contrary to Roby's contentions, the Chamber fully supports Boeing's position.

The Chamber's motion for leave to file the accompanying *amicus curiae* brief should be granted.

Respectfully submitted,

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INTEREST STATEMENT OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation.[1] It represents an underlying membership of more than 3 million businesses and business organizations of every size, industrial sector, and geographic region. The Chamber regularly advocates its members' views in this Court and other appellate forums. It initiates and enters litigation involving issues of national concern to the American business community.

Many of the Chamber's members provide goods and services to the United States under government contracts. In performing those contracts, Chamber members often provide replacement components, conduct overhaul work, or remanufacture or upgrade existing defense systems. In addition, virtually all of the Chamber's members enter into commercial contracts, some of which contain consequential damages provisions that allocate the risks to which the contracting parties are subject.

Black's Law Dictionary (7th ed. 1999) defines "consequential damages" as "[l]osses that do not flow directly and immediately from an injurious act, but that result indirectly from the act." The Sixth Circuit's willingness to permit the recovery of the full replacement cost of an aircraft lost as the result of a defective component allows the Government to recover what are "consequential damages," despite the fact that the False Claims Act, 31 U.S.C. §§ 3729-

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[1] Pursuant to Supreme Court Rule 37.6, the Chamber hereby affirms that no counsel for any party authored any part of this brief, and that no person or entity other than the Chamber and its legal affiliate, the National Chamber Litigation Center, Inc., provided financial support for its preparation or submission.

3733 (1986) ("FCA"), excludes consequential damages and provides instead for trebling of direct damages in lieu of consequential damages. This overreaching threatens to expand the risk of exposure for Chamber members under the FCA beyond limitations prescribed by Congress. Moreover, by obliterating the proper distinction between direct and consequential damages, the Sixth Circuit puts consequential damages provisions in the Chamber members' commercial contracts in jeopardy. Consequently, the Chamber has a strong interest in the proper resolution of this case.

The Chamber believes this Court should grant certiorari to resolve both questions presented in Boeing's petition, however, the Chamber addresses only the second question regarding the amounts permissible as damages under the FCA. The Chamber submits this brief to show the importance of that issue not just to the parties involved, but to the countless businesses that are affected by this case.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE IMPORTANT FEDERAL QUESTION OF WHAT CONSTITUTES DAMAGES ALLOWABLE UNDER THE FCA

Having erroneously concluded that the federally-mandated High Value Items Clause does not preclude the Government from recovering damages for loss of Government property under the FCA, the Sixth Circuit then considered the appropriate method to compute the Government's damages in this case. Its holding – that the Government may recover, as damages for the submission of a purportedly false claim in connection with remanufacturing work on a Government-owned aircraft, the full value of the lost aircraft, trebled – is inconsistent with: (1) the statute

itself; (2) *Cook County, Ill. v. United States ex rel. Chandler*, 123 S. Ct. 1239 (2003); (3) *United States v. Bornstein*, 423 U.S. 303 (1976); and (4) *United States v. Aerodex, Inc.*, 469 F.2d 1003 (5th Cir. 1972).

The Sixth Circuit was improperly influenced by the assumed criticality of the defective part involved in this case. This is not, however, a case that is, or can be, controlled by common law notions of either contractual or tort "damages." Rather, this case is entirely a creature of federal statute.

The impact of the Sixth Circuit's holding on defense, aerospace and aviation contractors and subcontractors doing business with the Government is enormous: contractors who supply relatively small components or perform repairs now face potential liability for treble the entire value of multi-million and multi-billion dollar, complex defense systems. This holding, the Chamber respectfully submits, is contrary to express Congressional intent to exclude consequential damages from the FCA, and is out of line with Supreme Court and other precedent concerning FCA damages. In addition, the lower court's inclusion as direct damages of what are properly classified as consequential damages exposes parties to commercial contracts to unanticipated and unintended risks of financial disaster.

The FCA was not intended by Congress to be a mechanism for the Government to recover common-law like property damages caused by a defective component. The damages that are available under the FCA are those defined by the conduct prohibited by the statute – the submission of a false claim. 31 U.S.C. § 3729(a) (anyone who knowingly presents a false claim to the Government is liable for civil statutory penalties "plus 3 times the amount of damages which the Government sustains *because of the act* of that person") (emphasis added). The critical word is "act" and the

"act" is the submission of the false claim. Consequential damages are not available. *Chandler*, 123 S. Ct. at 1247 n.9 ("The treble damages provision was, in a way, adopted by Congress as a substitute for consequential damages"). Thus, where the statute focuses on the false claim itself, the phrase "because of" cannot be construed as opening the door to consequential damages.

In an FCA action for substandard goods, "the proper method for determining direct damages is the difference between the market value of the [goods] received and retained and the market value that the [goods] would have had if they had been of the specified quality." *Bornstein*, 423 U.S. at 317 n.13. It is clear from the context of *Bornstein* that the "goods" are *only* the components which are the express subject matter of the false claims and *not* an entire system in which the "goods" may be installed. In contrast to the Sixth Circuit's decision below, courts applying this "diminution in value" measurement of damages generally look to the contract price to establish the value of the goods as promised. *See, e.g., United States ex rel. Compton v. Midwest Specialties*, 142 F.3d 296, 304-05 (6th Cir. 1998) (affirming award of damages based on the contract price, which equaled the value of the goods contracted for less the value of the goods as delivered); *United States v. Hibbs*, 568 F.2d 347, 351 (3d Cir. 1977) (when a defective article is purchased in a fraudulent transaction, the measure of damages is the difference in cost as contracted for and as received); *United States v. Woodbury*, 359 F.2d 370, 379 (9th Cir. 1966) ("Ordinarily, the measure of the Government's damages would be the amount that it paid out by reason of the false statements over and above what it would have paid if the claims had been truthful").

As shown in *Aerodex*, a case neither distinguished nor discussed by the Sixth Circuit below, the FCA does not include as damages costs incurred as the result of the delivery of a defective product that are above and beyond the price of the defective product itself. 469 F.2d at 1011. In *Aerodex*, the Government filed an FCA action against Aerodex for making false claims for payment in connection with a $27,000 contract for manufacture of certain aircraft engine bearings. Aerodex delivered, and the Government accepted, bearings that did not comply with the contract specifications. When the Government later discovered that the bearings were noncompliant, it removed and replaced them at a cost of $161,000. *Id.* at 1006. The court held that, although Aerodex was liable under the FCA for the $27,000 paid by the Government for proper bearings it did not receive, the Government could not recover the $161,000 spent in removing and replacing the improper bearings because that damage was consequential in nature and not recoverable under the FCA:

> [T]he language of the False Claims Act does not include consequential damages resulting from delivery of defective goods. The statute assumes double damages attributable to the "act" which in this case is the submission of the false vouchers. The submission of these vouchers was not the cause of the Government's consequential damages. The delivery and the installation of the bearings in the airplanes, not the filing of the false claim, caused the consequential damages.
>
> In a case of this kind, damages under the False Claims Act must be measured by the amount

> wrongfully paid to satisfy the false claim (citations omitted).[2]

Id. at 1011. In other words, the Government cannot go outside the parameters of the contract and recover more than the contract price.

When Congress amended the FCA in 1986, it explicitly declined to overrule the holding in *Aerodex* and allow recovery of consequential damages. In fact, when Congress rejected the recovery of consequential damages under the FCA, it understood, citing to *Aerodex*, that replacement costs of a defective item would not be recoverable. *See* S. Rep. No. 345, 99th Cong., 2d Sess. 19 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5284. The Sixth Circuit was obliged to respect Congress's choice in this regard and therefore should have followed *Aerodex's* holding, limiting baseline FCA damages to the "amount wrongfully paid on the false claim." 469 F.2d at 1011.

Thus, in an FCA case involving a defective component, damages should be measured by the cost of the defective component, as opposed to the value of the item in which it was installed, so as to limit damages to the amount wrongly paid as a result of the false claim. Indeed, in *Bornstein*, this Court measured damages based on the value of the falsely marked tubes, not the value of the radio kits, of which they formed a part. *Bornstein*, 423 U.S. at 316 n.13. The Sixth Circuit here attempts to distinguish *Bornstein* on

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[2] The *Aerodex* court noted that these consequential damages *were* recoverable as single damages under the claim for breach of warranty alleged in that action. *See* 469 F.2d at 1011-12. Due to the partial settlement reached by the parties in this case, no issue pertaining to breach of warranty damages is before this Court.

the grounds that "the invoices for radio kits that contained falsely marked electron tubes 'included claims for payment for the falsely marked tubes.'" *United States ex rel. Roby v. Boeing*, 302 F.3d 637, 646-47 (6th Cir. 2002). This distinction leads to the anomalous result that FCA damages for a false invoice containing separate line items for each component used in equipment would be less than the damages for an invoice that contained only one line item for the delivered equipment, even though actual damages are the same. In other words, if Boeing had included in its invoice for the remanufactured helicopter a separately stated claim for the $4,874 that Boeing paid for the gear, the damage to the Government would have been the same as it was in this case where "Boeing billed the Government for remanufactured helicopters as units, not as assemblages of assorted parts." *Id.* at 646. Yet, the Sixth Circuit rejected the argument that damages should be limited to the portion of the contract price attributed to the defective gear on the ground that *Bornstein* involved bills for assemblages of assorted parts, not units, even though the cost of the defective gear in this case was readily available. *Cf. United States ex rel. Roby v. Boeing*, 79 F. Supp. 2d 877, 880 n.6 (S.D. Ohio 1999) ("Relator asserts that Boeing paid Speco $4,874 for the cost of the defective gear . . ."), *aff'd* 302 F.3d 637 (6th Cir. 2002).

The FCA, however, provides damages only for that portion of a claim that is false. In the instant case, the amount wrongfully paid to satisfy the false claim is that portion of the contract price attributable to the defective gear. *Cf. United States v. Halper*, 490 U.S. 435 (1989) (accepting district court's measure of damages as difference between the improper billing rate of $12 per claim and the proper billing

rate of $3 per claim).[3] The rule that damages in an FCA case involving a defective component should be measured by the cost of the defective component, as opposed to the replacement cost of the item in which it was installed, limits damages to the amount wrongly paid as a result of the false claim. Had the Sixth Circuit followed the rationale of these precedents, it would have held that damages are to be measured by separating the portion of Boeing's claim that was false (*i.e.*, the cost attributable to the defective gear) from the entire claim (*i.e.*, the invoice delivered with the helicopter itself). Thus, not only is the Sixth Circuit's decision in direct conflict with the Fifth Circuit's holding in *Aerodex*, it is out of step with this Court's *Bornstein* and *Halper* decisions.

This Court should grant Boeing's petition to resolve this conflict, to provide the lower courts with further guidance on how to measure damages under the FCA, and to clarify that baseline damages are not to exceed the amount of the alleged false claim.

II. THIS COURT SHOULD GRANT REVIEW TO PRESERVE THE PROPER DISTINCTION BETWEEN DIRECT AND CONSEQUENTIAL DAMAGES

Congress contemplated including consequential damages language in the FCA when it amended the statute in 1986, but deliberately deleted this proposed language from the final enactment. Consequential damages therefore are not available under the FCA. *See Chandler*, 123 S. Ct. at 1247

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[3] *Hudson v. United States*, 522 U.S. 93 (1997), disavowed *Halper*'s Double-Jeopardy Clause analysis, but did not disagree with *Halper*'s calculation of damages.

n.9. *See also, Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974) (when a provision is deleted before enactment, such action "strongly militates against a judgment that Congress intended a result that it expressly declined to enact"); *Russello v. United States,* 464 U.S. 16, 23-24 (1983) (same). Thus, Congress rejected the very damages that the Sixth Circuit would allow in this case.

If not overturned, the Sixth Circuit's ruling could significantly change the allocation of risks negotiated between parties to any contract that excludes consequential damages. As such, the Sixth Circuit's treatment of damages presents an inappropriate risk to the Chamber's members, and others, under commercial contracts as well as under the FCA.

Generally, consequential damages are defined as damages that "do[] not flow directly and immediately from the act of the party, but only from the consequences or results of such act." 25 C.J.S. Damages § 2 (1966). *See also Black's Law Dictionary* (7th ed. 1999) ("consequential damages" are "[l]osses that do not flow directly and immediately from an injurious act, but that result indirectly from the act").

As stated in Boeing's petition, the Sixth Circuit defined damages to include what are commonly recognized as consequential damages under the Uniform Commercial Code and the common law. Pet. at 29 (citing, as an example, 1 J. White & R. Summers, *Uniform Commercial Code*, § 10.4, 567 n.10 (4th ed. 1995).

Indeed, White and Summers would classify the replacement cost of the helicopter in this case as consequential damages:

> In *Russo v. Hilltop Lincoln-Mercury, Inc.*, [479 S.W.2d 211, 10 UCC 768 (Mo. App. 1972)], defective wiring caused a fire which destroyed the buyer's new automobile. The court awarded the buyer the full purchase price of the automobile without identifying that portion of the price which represented recovery for consequential damages. Only the difference between the automobile's warranted and actual value at the time of acceptance could be recovered as general damages under 2-714(2). The defective wiring system reduced the actual value of the automobile at the time of acceptance below the purchase price, but the defect did not render the auto worthless as of the acceptance date. A large part of the fire damage was therefore consequential. Had the parties excluded consequentials by contract, the court would have had to identify the value differential component of the buyer's total loss.

Id. at 567. White and Summers teaches that to properly exclude consequential damages, the value of a defective item is to be measured at the time of acceptance. Because the defective gear did not render the helicopter worthless at the time it was delivered, the Sixth Circuit erred in holding that its value was zero.[4]

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[4] In this case, the Sixth Circuit effectively measured the value of the helicopter at the time of the accident. *Cf. Roby*, 302 F.3d at 647. The fact that the helicopter had some, likely substantial, value at the time that it was delivered is, however, evident in the fact that the Government did

(Footnote continued on next page)

The fact that the Government is *not* entitled to recover damages collateral to the underlying defect that causes a claim to be false is further supported by this Court's most recent FCA decision. In *Chandler*, this Court stated that the FCA does not expressly provide for the consequential damages that ordinarily are awarded for fraud. 123 S. Ct. at 1247. Rather, trebling was provided as the statutory quid pro quo as a substitute for consequential damages. *Id.*

In stating that consequential damages are typically awarded in non-FCA fraud cases, this Court cited section 549(1)(b) and Comment d of the *Restatement (Second) of Torts* (1976). 123 S. Ct. at 1247. Section 549(1)(b) declares that the measure of damages for common law fraud includes "pecuniary loss suffered otherwise as a consequence of the recipient's reliance upon the misrepresentation." *Restatement (Second) of Torts* at § 549(1)(b). Comment d to clause (1)(b) explains that:

> [a]lthough the most usual form of financial loss caused by participation in a financial transaction induced by a fraudulent misrepresentation is the lessened value of the subject matter due to its falsity, the loss may result from a purchaser's use of the article for a purpose for which it would be appropriate if the representation were true but for which it is in fact harmfully inappropriate. So, too, it may be the expense to which he has gone in preparation for a use of the article for which it

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(Footnote continued from previous page)
not seek treble the replacement cost of any of the other remanufactured helicopters that also contained the defective Speco gears.

> would have been appropriate if the representation had been true.

Id. at 112. The comment then states that "[t]hese 'indirect' or 'consequential' damages resulting from the misrepresentation are recoverable if the misrepresentation is the legal cause of them . . ." *Id.*

Because the *Restatement (Second) of Torts* makes clear that losses caused by the use of a product fraudulently represented to be of a certain quality are considered consequential damages, it is clear that this Court understood that the FCA precludes recovery for the loss of a product suffered as a result of the Government's use of the product where, as alleged here, the contractor falsely certified that the product conformed to the contract. In this case, the loss of the helicopter resulted from the mishap caused by operating the helicopter with the defective gear, not from the filing of the false claim. Thus, the Sixth Circuit erred in holding that the Government could potentially recover the replacement cost of the helicopter. This is especially true given that the contract at issue here called for Boeing to refurbish a government-owned helicopter rather than to purchase and provide a refurbished helicopter.

In sum, the Sixth Circuit's damages methodology would dramatically change the nature of the FCA, converting it to a mechanism to recover consequential property damages - trebled - rather than one to recover monies paid to a contractor because of submission of a false claim. Indeed, permitting the Government to recover direct and consequential damages trebled would result in a huge over recovery. This is not what Congress or this Court intended. Moreover, the Sixth Circuit's willingness to permit the recovery of all damages necessary to make the Government whole for the destruction of the helicopter, despite the fact

that consequential damages are not compensable under the FCA, threatens to blur the line between direct and consequential damages. This, in turn, threatens to expand the category of damages available in numerous contracts excluding consequential damages beyond existing, well-established limitations. For parties who previously negotiated a lower price in return for assuming the risk of consequential damages, this could result in a windfall. For parties who believed the risk of consequential damages presented an unacceptable risk and, therefore, negotiated to exclude consequential damages, this could result in financial ruin.[5] Boeing's petition should be granted to permit this Court to correct the confusion regarding the definition of consequential damages engendered in the Sixth Circuit's decision.

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5 Included in the Chamber members' contracts are contracts for commercial aircraft and satellites. The replacement cost of a single aircraft or satellite could be enormous. Thus, when a business installs a relatively small and/or inexpensive component on a high value item, it will often negotiate to limit its risk for such losses.

CONCLUSION

For all of the foregoing reasons and for the reasons set forth in Boeing's Petition for Writ of Certiorari, the Chamber respectfully requests this Court to grant Boeing's petition.

Respectfully submitted,

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No. 02-1411

In The
Supreme Court of the United States

THE BOEING COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA *EX REL.*
BRETT ROBY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*; and BRIEF *AMICUS CURIAE* OF NATIONAL DEFENSE INDUSTRIAL ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Petitioner The Boeing Company ("Boeing") and Respondent the United States have each consented to the filing of this brief by *amicus curiae* National Defense Industrial Association ("NDIA"). Because the relator, Brett Roby, has withheld consent, NDIA hereby moves, pursuant to Supreme Court Rule 37.2(b), for leave to file an *amicus curiae* brief in support of Petitioner.

The National Defense Industrial Association ("NDIA") is a non-partisan, non-profit, international association representing over 1,000 companies and 24,000 individuals from the defense and national industrial bases. NDIA's mission is to provide a forum for the interchange of ideas between the government and industry to address problems of joint concern, including business and technical aspects of the government acquisition and procurement process.

NDIA represents companies and individuals who contract with the government to provide vital military equipment, weapons, and machinery. The High-Value Items Clause ("HVIC") that is implicated in this case is a fundamental part of contracts for the design, manufacture, and delivery of high value items. NDIA members have an interest in the scope of protection afforded by the HVIC and are directly affected by the Sixth Circuit's decision.

The relator's letter responding to NDIA's request for consent to file this *amicus* brief baselessly asserts that this brief is "no more than a second bite at the apple for Boeing."[1]

[1] This letter and other correspondence regarding NDIA's requests for consent have been filed in the office of the Clerk.

Although Petitioner is a member of NDIA, it has not made any financial contribution to this brief's preparation or submission. NDIA's members have their own vital and practical interest in the legal issues raised by this case, particularly the application of the HVIC. NDIA members are many of the very companies who stand to lose the protections intended by this important contract provision. It is notable, moreover, that the United States – which is the real party in interest in a False Claims Act case – has consented to the filing of this *amicus* brief. *See, e.g.*, *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 720 (9th Cir. 1994) (United States is the real party in interest); *United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 50 (4th Cir. 1992) (same).

NDIA frequently represents the interests of its members as *amicus curiae* in federal courts. NDIA's background and experience in areas such as the business and technical aspects of the government-industry relationship are highly germane to this case. NDIA submits this brief to illustrate the impact of the Sixth Circuit's decision on the defense industry and on government procurement costs. Certiorari review is needed to correct the Sixth Circuit's erroneous interpretation of the HVIC and to resolve the far-reaching uncertainty occasioned by that decision. Given the ramifications of this case on NDIA members and on the costs of our national defense, NDIA respectfully requests leave to file the attached brief *amicus curiae* in support of Petitioner.

Respectfully submitted,

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BRIEF OF NATIONAL DEFENSE INDUSTRIAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This *amicus curiae* brief is submitted on behalf of the National Defense Industrial Association ("NDIA").[1] Petitioner The Boeing Company and Respondent the United States have consented to NDIA's filing of this brief. The relator, Brett Roby, has withheld consent. A motion for leave to file an amicus brief under Supreme Court Rule 37.2(b) is included with this brief. The correspondence regarding NDIA's requests for consent have been filed in the office of the Clerk.

I. INTEREST OF *AMICUS CURIAE*

The National Defense Industrial Association ("NDIA") is a non-partisan, non-profit, international association representing over 1,000 companies and 24,000 individuals from the defense and national industrial bases. NDIA's mission is to provide a forum for the interchange of ideas between the government and industry to address problems of joint concern, including business and technical aspects of the government acquisition and procurement process.

[1] This brief was authored by outside counsel for NDIA. Counsel for NDIA served as co-counsel to Petitioner in the trial court, but do not represent Petitioner in this Court and did not represent Petitioner in the court of appeals. No person or entity, other than NDIA's members, made a monetary contribution to this brief's preparation or submission. *See* Sup. Ct. R. 37.6. Although Petitioner is a member of the NDIA, it has not made any financial contribution to this brief's preparation or submission.

NDIA members support our national defense by contracting with the government to provide vital military equipment, weapons, and machinery. The High-Value Items Clause ("HVIC") is a fundamental part of contracts for the design, manufacture, and delivery of high value items. The government's policy of self-insurance, which is embodied in the HVIC, provides defense contractors important protections from liability. This, in turn, allows the government to enjoy significantly reduced procurement costs when purchasing the military products that form the backbone of our national security.

The Sixth Circuit's decision dramatically undercuts the HVIC. It expands liability for defense contractors and opens the door to correspondingly higher procurement costs for critical military equipment. NDIA submits this brief to illustrate the impact of the Sixth Circuit's decision on the defense industry and government procurement costs, and to argue that certiorari review is needed to correct the Sixth Circuit's erroneous interpretation of the HVIC and to resolve the far-reaching uncertainty occasioned by that decision.

II. SUMMARY OF ARGUMENT

For the last six decades, self-insurance has been a cornerstone of the government's efforts to minimize procurement costs in the critical realm of defense contracting. The High-Value Items Clause ("HVIC") implements this system of government self-insurance by limiting a contractor's liability for loss of government property due to product defects. Because contractors are not liable for such losses, they do not need to purchase

insurance for such losses and, therefore, private insurance costs are not passed on to the government.

The Sixth Circuit's decision runs roughshod over this long-standing system by holding a contractor liable under the False Claims Act ("FCA") for the full value of a sophisticated military helicopter, even though the loss was indisputably caused by a product defect as defined by the HVIC. The Department of Defense long ago made a conscious decision to self-insure such losses even where, as here, they result from alleged fraud by low-level employees.

The exception now created by the Sixth Circuit is nothing less than a judicial overhaul of a half-century of government self-insurance in defense contracting. Because claims based on defective military products can easily be couched as FCA claims, the Sixth Circuit's decision exposes defense contractors to massive liability for which they justifiably have not insured. Likewise, the Sixth Circuit short-sightedly condemns the government to increased future procurement costs, as contractors are forced to seek insurance for this newly imposed potential liability. The Court should grant a writ of certiorari to consider the decision's severe impact on the procurement of military products critical to our national defense – a decision that defies plain meaning, regulatory history, and prior judicial interpretation.

Additionally, the Sixth Circuit's decision contravenes the established principle that the amount of damages available under the FCA, before trebling, cannot exceed the total amount paid by the government on the allegedly false claim. Regardless of the HVIC, allowing the government to recover the full value of a destroyed product is an

unprecedented and unjustifiable expansion of FCA remedies.

III. ARGUMENT

A. THE SIXTH CIRCUIT'S DECISION EVISCERATES THE LONG-SETTLED MEANING OF A CRITICAL CONTRACTUAL PROTECTION ON WHICH DEFENSE CONTRACTORS HAVE RELIED FOR DECADES

Since World War II, the government has adopted a policy of self-insuring vital military products it obtains from manufacturers. The High-Value Items Clause ("HVIC") is a fundamental part of this self-insurance system. The HVIC insulates manufacturers from liability for damage to government property, including the product itself, caused by a defect or deficiency in the product and occurring after delivery to the government. Up until the Sixth Circuit's decision, it was well-settled that the government self-insurance policies embodied in the HVIC protect government contractors from such liability, regardless of whether it is sought to be imposed under the False Claims Act ("FCA") or some other statutory or common law theory.

The Sixth Circuit's decision upsets this decades-long understanding of the HVIC. By allowing the government to recover the full value of a helicopter governed by the HVIC, the decision is directly contrary to the plain meaning, regulatory history, and appellate court interpretation of government contractor self-insurance provisions.

1. The High-Value Items Clause ("HVIC")

The HVIC, one of several limitation of liability regulations, provides that "the Contractor shall not be liable for loss of or damage to property of the Government . . . that . . . results from any defects or deficiencies in the supplies." 48 C.F.R. § 52.246-24(a). The Federal Acquisition Regulations ("FARs") require this clause to be included in every government contract for high-value items.[2] The FARs explicitly state that the HVIC's limitation of liability stems from the government's policy that "it will generally act as a self-insurer" with respect to post-acceptance damages that result from defects or deficiencies in the supplies. *Id.* § 46.803(a).

The only exceptions to the HVIC and the government's policy of self-insurance are expressly listed in the FARs, and the exceptions prove that the regulation was intended to apply in these circumstances. The only possibly relevant exception applies where the defect or deficiency "results from willful misconduct or lack of good faith on the part of any of the Contractor's managerial personnel." *Id.* § 52.246-24(b). Here, the parties stipulated that there was no such conduct by "managerial personnel," Pet. App. 9a, which the FARs define as a limited subset of the contractor's high-level executives. *See id.* § 52.246-24(b)(1)-(3). NDIA does not dispute that this exception eliminates a contractor's HVIC protection where such executives are guilty of

[2] The FARs define a "high-value item" as one having "a high unit cost (normally exceeding $100,000 per unit), such as an aircraft, an aircraft engine, a communication system, a computer system, a missile, or a ship," as well as any item designated as a high-value item by the contracting officer. 48 C.F.R. § 46.802.

willful misconduct or bad faith. It necessarily follows, however, that damages arising from such misconduct by employees ***other*** than these top executives are within the purview of the HVIC and may not be recovered under the FCA or any other theory of liability.

2. History of the HVIC

The government's policy of self-insurance, now embodied in the HVIC, began during World War II. In early 1942, the Department of the Navy decided to self-insure the risk of loss or damage to certain complicated structures and machines. *See* Affidavit of H. Struve Hensel (June 4, 1971) ¶ 7 ("Hensel Aff."), Appendix of *Amicus Curiae* NDIA ("NDIA App.") 4-5.[3] The policy was a deliberate response to the costs of insurance that contractors, by necessity, include in the price of military supplies. *See id.* ¶¶ 6-7, NDIA App. 4-5. These prices had become "astronomical," and after studying the issue the Navy decided that self-insurance would be the most economical solution. *Id.* ¶ 6, NDIA App. 4. As one key architect of the self-insurance policy explained:

> [I]f the United States assumed all such risks of loss and eliminated all appropriate costs in respect

[3] This affidavit was prepared in connection with *Australia v. Lockheed Aircraft Corp.*, No. 69-1623-WPG (C.D. Cal. Jan. 10, 1972). Mr. Hensel served in three capacities during World War II: Special Assistant to Under Secretary of the Navy Secretary James Forrestal; Head of the Navy's Office of General Counsel; and Assistant Secretary of the Navy. *See* Hensel Aff. ¶ 3, NDIA App. 2-3. During the Eisenhower Administration, Mr. Hensel served as General Counsel of the Department of Defense and as Assistant Secretary of Defense. *See id.* ¶ 9, NDIA App. 6.

> thereof from the contract price, the contract price would be appreciably lower, since the United States would have a spread of risk unattainable by any private insurance company and the United States would be able to eliminate the overhead expenses, commissions and profit requirements of the private insurance companies.

Id. ¶ 7, NDIA App. 4-5.

Following the war, the U.S. military implemented this policy with respect to all procurement programs. *Id.* ¶ 11, NDIA App. 6-7. Litigation shortly following World War II confirmed to the defense industry that the government's policy of self-insurance relieved a manufacturer from liability for covered damages, even where the government sought to recover such damages under the False Claims Act. Litigation shortly following World War II confirmed that the government's policy of self-insurance relieved a manufacturer from liability for covered damages, even where the government sought to recover such damages under the False Claims Act. In *United States v. United States Cartridge Co.*, 198 F.2d 456 (8th Cir. 1952), the government argued that it was free to pursue FCA remedies for alleged quality control lapses in the production of ammunition, despite clear contractual language relieving the contractor of liability for losses that were not the result of high level misconduct. The Eighth Circuit squarely rejected the government's argument that the FCA could provide a remedy for losses that the government, by contract, had agreed to bear. *Id.* at 465.

In 1971, the Department of Defense issued the Armed Services Procurement Regulations ("ASPR"), which formalized the government's practice of self-insurance and were expressly "aimed at reducing Government procurement

costs by limiting the contractor's risk." *Defense Procurement Circular 86* ("DPC 86"), at 1 (1971), C.A. J.A. 434.

This limitation on contractor liability was expansive, covering both contract and tort liability. *Id.*, C.A. J.A. 435 ("[S]ince the policy and the clauses limit liability in terms of loss of or damage to the property of the Government resulting from the deficient supplies . . . no distinction is made between liability founded on contract or in tort."). Such a comprehensive protection was critical to achieve the policy's objectives. Too many exceptions would be "self-defeating," because contractors would require "some continuation of product liability insurance protection for the risk exposure that the Government has not assumed." 4 U.S. Comm'n on Gov't Procurement, *Report of the Comm'n on Gov't Procurement* ("Comm'n Rep.") (1972), C.A. J.A. 406. Consequently, the ASPRs provided that a contractor would be liable only in the event of certain expressly designated conditions.

One exception contained in the original ASPRs provided that the contractor could be liable "when the defects or deficiencies . . . resulted from fraud or gross negligence as amounts to fraud on the part of any personnel of the Contractor." DPC 86, C.A. J.A. 437 (ASPR § 7-104.45(b)). It was soon recognized, however, that this was precisely the kind of self-defeating provision that would thwart the goal of eliminating the cost of contractor liability insurance from government procurement. Accordingly, a group of defense associations urged the Department of Defense to eliminate this exception. *See* Letter from Council of Defense & Space Indus. Ass'ns ("CODSIA"), to Captain E.C. Chapman, Chairman, ASPR Committee (Aug. 12, 1971), C.A. J.A. 464-65. Although defense contractors had accepted the risk of liability stemming from willful or bad

faith misconduct by high-level management personnel, imposing liability based on ***any*** such conduct by ***any*** contractor personnel would create the need for "substantial liability insurance." *Id.* ("Unless ... the exception regarding fraud of any personnel is removed, there is serious question whether DPC 86 implementation will have any real effect upon the cost of Contractor insurance.").

In direct response to this concern, the Department of Defense deleted the fraud exception in 1974. ASPR § 7-104.45(b) (July 1, 1974), C.A. J.A. 485-86. The regulatory history of this change confirms that it was designed to insulate the contractor from liability for "damage to Government Property resulting from defective items and caused by the fraud or gross negligence as amounts to fraud of any personnel of the contractor." Mem. from Dep't of the Air Force to the Chmn. of the ASPR Comm. 3, C.A. J.A. 652.[4]

The current HVIC is virtually unchanged from the 1974 version of the ASPRs, which were intended to protect contractors from liability even where defects stem from fraud by the contractors' employees. There is no subsequent regulatory history indicating any intent to modify the scope of the HVIC. To the contrary, the HVIC's plain terms provide that contractors are not liable for "loss of or

[4] NDIA is a member of CODSIA, the organization that originally urged the Department of Defense to remove the fraud exception. The National Security Industrial Association (which became NDIA when it combined with the American Defense Preparedness Association) was one of CODSIA's founding members. Accordingly, NDIA has a strong interest in ensuring that this significant regulatory change is given effect.

damage to property of the Government (including the supplies delivered under this contract) that . . . results from any defects or deficiencies in the supplies." 48 C.F.R. § 52.246-24(a). Although the government does not bear the risk of losses stemming from fraudulent conduct by the contractor's high-level managerial personnel, *id.* § 52.246-24(b), it has consciously accepted risks that might result from the fraud of other personnel, in order to accomplish the overriding objective of minimizing procurement costs.

3. By Upsetting the Long-Established Meaning of the HVIC, the Sixth Circuit's Decision Creates Virtually Unlimited Contractor Liability for Losses that the Government Intended to Self-Insure and Will Significantly Increase Government Procurement Costs

1. NDIA members who contract with the government have relied for decades on the plain language and purpose of the HVIC, which precludes recovery for damages to government property stemming from "defects or deficiencies in the supplies." *Id.* § 52.246-24(a). In accordance with the HVIC and the government's general policy of self-insurance, contractors have not insured against such liability, and therefore have not passed corresponding insurance costs on to the government.

The Eighth Circuit's decision in *U.S. Cartridge* made clear that the government's practice of self-insurance, embodied in the HVIC, also prevents recovery of such damages under the FCA. The 1974 amendments to the procurement regulations confirm that the HVIC applies to damages resulting from fraud by contractor employees other than high-level executives. In the instant case, however, the Sixth Circuit concluded that the HVIC

provides no protection because the loss "was actually caused by Boeing's initial misrepresentation that the helicopter conformed to contract requirements." Pet. App. 9a-10a. Fraud by lower-level employees that results in a defective product necessarily also results in a product that is out of conformity with contract requirements. Yet such fraud does ***not*** eliminate the HVIC's protections.[5] The Sixth Circuit's ruling is in conflict with that of the Eighth Circuit and ignores the Defense Department's conscious decision in 1974 to limit the fraud exception.

2. Although the Sixth Circuit's opinion is limited to FCA claims, it could create nearly unlimited liability for contractors with respect to losses that the HVIC purportedly covers. A claim arising from "defects or deficiencies" is easily cast as an FCA claim based on the allegation that the contractor misrepresented the product's conformance with contract requirements. *See, e.g.*, Pet. App. 29a-30a (noting that plaintiff's FCA claims are based on allegation that Petitioner had "falsely represented that the contracted helicopters conformed to all of the specified contract requirements."). Accordingly, ***every*** defective or deficient product can potentially give rise to an FCA claim where, as here, the contractor has allegedly certified such compliance. The Sixth Circuit's judicially created exception for FCA claims, therefore, would substantially nullify the protections afforded by the HVIC.

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[5] It is stipulated in this case that there was no willful misconduct or lack of good faith by managerial personnel. Pet. App. 9a; *see* 48 C.F.R. § 52.246-24(b).

Moreover, the Sixth Circuit's logic could eliminate HVIC protection for all non-contractual bases for liability. The Sixth Circuit agreed that the loss of the helicopter in this case satisfied the core elements of the HVIC: "the loss of the helicopter occurred after Government acceptance and resulted from the defective Speco gear." Pet. App. 9a. Nonetheless, the court held that the HVIC's clear limitation on contractor liability could be evaded because the loss "was actually caused by Boeing's initial misrepresentation that the helicopter conformed to contract requirements." Pet. App. 9a-10a. On this logic, the fact that a defect caused the loss is irrelevant, so long as the government can point to some additional theory of liability. In fact, counsel for the government endorsed this position in its briefs below, arguing that the "High Value Items Clause applies solely to 'contractual liability.'" Br. of Plaintiff-Appellee the United States at 22 (quoting 48 C.F.R. § 46.803(b).

3. The uncertainty occasioned by the Sixth Circuit's decision will have a widespread impact on the defense industry and the government's ability to keep procurement costs low, at a time when our national security can ill afford such consequences. The Sixth Circuit's decision exposes defense contractors to massive liability that they justifiably have not insured in light of the HVIC. In addition, the Sixth Circuit's decision will substantially increase the costs of future government procurement. The decision puts defense contractors in the position of seeking to purchase insurance for losses that previously had been covered by the HVIC. Ultimately, the costs of this insurance will be passed on to the government, resulting in exactly the higher procurement costs that the HVIC seeks

to avoid. 48 C.F.R. § 31.205-19 (allowing inclusion of insurance costs).[6]

These insurance costs will be substantial, because the added costs of insurance will be factored in at each stage of the "procurement pyramid." The Sixth Circuit's evisceration of the HVIC impacts not only prime contractors, but also lower tier subcontractors and suppliers. Thus, companies at every level of the manufacturing process may obtain insurance to cover a single risk. If this happens, then the increased cost to the government for the contract deliverable will be exponential rather than incremental. This exponential cost increase will be exacerbated by the fact that insurance premiums have increased since the September 11th attacks. *See Stability Amid Turmoil*, Risk & Insurance, no. 5, vol. 13, at 62 (Apr. 15, 2002) (noting that property and liability insurance premiums increased an average of twenty to fifty percent after September 11th).

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[6] Section 31.205-19 states in pertinent part:

> (2) Costs of insurance maintained by the contractor in connection with the general conduct of its business are allowable, subject to the following limitations:
>
> * * *
>
> (iv) Costs of insurance for the risk of loss of or damage to Government property are allowable only to the extent that the contractor is liable for such loss or damage and such insurance does not cover loss or damage that results from willful misconduct or lack of good faith on the part of any of the contractor's directors or officers or other equivalent representatives.

48 C.F.R. § 31.205-19.

Finally, the impact of the Sixth Circuit's decision will be felt nationwide, not merely in the four states that comprise the Sixth Circuit. The FCA allows actions to be brought anywhere a defendant transacts business. *See* 31 U.S.C. § 3732(a). Thus, major contractors who transact business nationwide must presume that they will be subject to the Sixth Circuit's rule and will be forced to purchase insurance for these newly created risks. Also, FCA claimants (whether individual relators or the government itself) may select Sixth Circuit fora to bring FCA claims involving the HVIC clause, and this will reduce the likelihood that other federal appellate courts will have the opportunity to consider the issue. Accordingly, the implications of the Sixth Circuit's decision require prompt guidance from this Court. It is critical that the Court review a question that is so vital to the government's defense procurement and the companies that support our national defense.

B. THE SIXTH CIRCUIT'S EXPANSION OF THE DAMAGES AVAILABLE UNDER THE FALSE CLAIMS ACT IS UNPRECEDENTED AND UNJUSTIFIABLE

The NDIA also agrees with Petitioner that the amount of damages available under the False Claims Act ("FCA"), before trebling, cannot exceed the total amount paid by the government on the allegedly false claim. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537, 551-52 (1943) ("[T]he chief purpose of the [FCA] was to provide for restitution to the government of money taken from it by fraud."); *United States v. Aerodex, Inc.*, 469 F.2d 1003, 1011 (5th Cir. 1972) ("[A] proper application of the [FCA] damage provision limits the government's claim to the amount that was paid

out by reason of the false claim."). Accordingly, certiorari is required to correct the Sixth Circuit's erroneous expansion of the FCA to allow the government to recover the full value of the product at issue, regardless of the amount of the contractor's claim for payment. The expanded scope of FCA liability exacerbates the concerns discussed *supra* regarding the suddenly increased liability facing defense contractors and the higher procurement costs stemming from the need for contractors to insure against future losses.

The government already has at its disposal a substantial arsenal of remedies, such as debarment, suspension, FCA statutory penalties, fees and costs, *see* 31 U.S.C. § 3729(a), as well as any contractual and warranty rights that it negotiates. FCA damages have never included recovery for the full value of a destroyed product. Rather, FCA damages have historically been limited to recovery of payments made as a result of the false claim. *See Hess*, 317 U.S. at 551-52. The Sixth Circuit's decision directly contravenes the established scope of FCA damages.

IV. CONCLUSION

As argued by the Petitioner, and supported by the foregoing additional reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

AFFIDAVIT OF H. STRUVE HENSEL

STATE OF NEW YORK)
) ss.
COUNTY OF NEW YORK)

H. STRUVE HENSEL, being duly sworn, deposes and says:

1. Since 1925 I have been admitted to practice law before the highest Court of the State of New York. Since 1943 I have been admitted to practice before the United States District Court for the District of Columbia. I have actually been engaged in that practice of law in such State and District since such dates, respectively, except for two periods of service with the United States Government – the first being from December 1940 to March 1946 with the Department of the Navy and the second being from January 1953 to June 1955 with the Department of Defense.

2. In this case I have been consulted by and advised Menasco Manufacturing Co. both as to the law and facts and as attorney for said defendant I have examined certain witnesses in depositions taken herein. At the same time, I am, to the best of my knowledge and belief, the only living official of the Department of the Navy who participated with the late Under Secretary of the Navy James Forrestal in establishing at the start of World War II the practice and policy of the Department of the Navy with respect to the assumption of risk by the Navy Department as to loss of or damage to end products by reason

of defects or deficiencies in components and the elimination of all insurance premiums or contingency allowances in respect of said risk from the prices paid for such end products by the Navy Department.

3. The service with the Department of the Navy commenced in December 1940 when I became a Special Assistant to Under Secretary of the Navy James Forrestal, in the course of which work I made, at his request, certain recommendations with respect to the practices and procedures to be followed in negotiation and preparation and signing of contracts for materiel and facilities by the Department of the Navy. Such recommendations which were made during March 1941 resulted in the establishment of a legal office, known as the Procurement Legal Division, in the office of the Under Secretary of the Navy and my appointment in July 1941 as Chief of such Division. The Procurement Legal Division of which I was the head was a separate legal office operated and controlled by civilians, entirely separate from the Office of the Judge Advocate General and concerned with rendering all legal services in respect of the procurement of materiel, including the negotiation, preparation, execution and administration of contracts with respect to such procurement. This was a complete innovation insofar as United States Government practice was concerned in that the equivalent of a self-contained law office or firm was created in the Department of the Navy to work on a lawyer-client relationship with the various procurement Bureaus of the Navy, with all lawyers reporting only to the head of the Procurement Legal Division and the head of that Division reporting only to the Under Secretary of the Navy. For a period of time, the members of the Procurement Legal Division, all of whom had experience in the practice of

commercial law, acted also as business advisors to the Under Secretary and the Bureaus and as negotiators of contracts in the various procuring Navy Bureaus. In August 1944 the name of the Procurement Legal Division was changed to the Office of the General Counsel for the Department of the Navy with, to quote the pertinent directive of the Secretary of the Navy "cognizance of all legal matters relating to the procurement or disposition of Naval materiel and facilities and such other legal duties as may be assigned * * * by the Secretary of the Navy, the Under Secretary or the Assistant Secretary for Air." I, as head of the Office of General Counsel, was designated as the General Counsel for the Department of the Navy, which position I held until January 30, 1945, when I became Assistant Secretary of the Navy with administrative cognizance over the procurement and disposition of materiel and facilities which cognizance had been previously exercised by James Forrestal, the Under Secretary of the Navy. I served as such Assistant Secretary of the Navy until March 1, 1946, when I resigned and returned to the private practice of law in New York City as a senior partner of the law firm of Carter, Ledyard & Milburn.

4. As Chief of the Procurement Legal Division and General Counsel of the Navy Department immediately preceding and during World War II, I participated actively as Under Secretary Forrestal's advisor in a complete reorganization of the procurement practices and contract forms in vogue at that time.

5. One of the problems encountered at the start of World War II in the procurement of materiel and facilities was the practice, dictated in part by statute, of requiring performance bonds in the construction of facilities and long term warranties of conformance to specifications and

freedom from defects with respect to supplies. This was very expensive for the United States as the costs of insurance and allowances for contingencies in respect thereof were included in the contract price or prices and paid for by the United States. It is axiomatic that all risks assumed by a manufacturer and seller must be covered by the contract price or the manufacturer and seller is soon out of business.

6. As the volume of procurement mushroomed from the millions of dollars into the billions, the cost of such insurance and allowances for such contingencies became astronomical. I became impressed with the mounting cost of insurance included in contract prices and it seemed to me that as the spread of risk to insurance companies greatly increased, the premium rate per $1.00 of insurance should have decreased, but such was not the case. I can remember calling a meeting of selected insurance brokers and representatives of insurance carriers which was held in Washington some time – according to my best recollection – before the outbreak of the war. At such meeting, I made a plea for reduced insurance premium rates in view of the increased spread of risk. When such reduction was refused, Under Secretary Forrestal ordered a study of the need for insurance and the most economical method of protecting the Navy against the inescapable risk of loss and damage.

7. The problem was studied and analyzed as solely a question of price, i.e., would it be ultimately cheaper to continue to impose the risk of loss on the contractor with the cost of such assumption being included in the contract price or would it be cheaper for the United States to eliminate all insurance and contingencies of that type from the contract prices and to assume the risk of loss

itself? It was recognized that insurance premiums would have to include all losses and also provision for brokerage commissions, insurance company overhead and profit and that such premiums would have to be included in the price paid by the Navy. Almost as soon as the problem was stated it became apparent that, if the United States assumed all such risks of loss and eliminated all appropriate costs in respect thereof from the contract price, the contract price would be appreciably lower, since the United States would have a spread of risk unattainable by any private insurance company and the United States as self-insurer would be able to eliminate the overhead expenses, commissions and profit requirements of the private insurance companies. As a result, I recommend to Under Secretary Forrestal that title to complicated structures and machines such as buildings, ships, airplanes and the like be vested in course of construction and manufacture in the United States and that the United States assume the risk of loss with respect to such complicated structures and machines and eliminate from contract prices all costs of insurance against such risks by the contractor. Such policy was adopted for the Department of the Navy by its Under Secretary early in 1942. Insurance costs against loss and damage from defects in end products and components were excluded from allowable costs in cost-plus-fixed-fee types of contracts and from the negotiated prices in fixed-price contracts. As a result, the United States Navy thereafter became the equivalent of a self-insurer (without creating any separate insurance fund) with respect to the loss and destruction of supplies and equipment inspected and accepted by the United States Navy in the performance of procurement contracts. Such policy continued throughout the war.

8. During the war, the Forrestal administration established its procurement procedures and practices by word-of-mouth, frequent staff meetings and the selection of personnel with a common background of education and commercial experience. The concept which later led to the establishment of the comprehensive set of prescribed contract clauses and detailed prescription of contract administration embodied in the current Armed Services Procurement Regulations was opposed in the Department of the Navy at that time. The Navy operated its materiel and facilities procurement with a minimum of written directives and circular letters. Nevertheless, attached hereto as Exhibit 1 is a circular letter dated August 6, 1942, and signed by Admiral S. M. Robinson, Chief of Procurement and Material. which sets forth certain practices directed to be followed with respect to the assumption of risks and attached hereto as Exhibit 2 is a letter dated 1 April 1944 and signed by Capt. Gokey in the Bureau of Ships, Department of the Navy, and sent to contractors with the Navy with respect to the same subject matter, i.e., the assumption of risk by the Navy and the elimination of insurance premiums from contract prices.

9. Shortly after the election of President Eisenhower in 1952, I was asked to become General Counsel of the Department of the Defense, which I did in January 1953. Such Office of the General Counsel of the Department of Defense was organized at that time along lines similar to those I had recommended and followed in the organization of the Office of the General Counsel of the Department of the Navy during World War II, except that, in addition to cognizance of legal matters concerning the procurement and disposition of materiel and facilities, I was the general legal advisor to the Secretary of Defense. I held that

position until the spring of 1954 when I became Assistant Secretary of Defense in charge of International Security Affairs with cognizance over the foreign military aid program running into the billions of dollars and the relations between the Department of Defense and the Department of State, from which position I resigned as of June 30, 1955.

10. As General Counsel of the Department of Defense, I was in charge of all legal services rendered in the military departments in respect of the procurement and disposition of materiel and facilities. Pursuant to my recommendation, Trowbridge vom Baur was appointed General Counsel of the Department of the Navy and he served in that capacity from December 15, 1953, to April 30, 1960.

11. Between my resignation from the Navy in 1946 and my entering service in the Department of Defense in 1953, my practice kept me in contact with procurement policies in the military departments and, to the best of my knowledge and belief, the same policy continued in all such departments excluding the cost of insurance against loss of the supply item from both cost-plus-fixed-fee and fixed-price contracts and the suppliers of materiel to the military departments entered into contracts with such military departments at prices which excluded all insurance or contingency allowances against such risk of loss. It was also generally understood in the negotiation of military contracts that the sole liability of any contractor in respect of a defective part or component was to replace or correct that defective part or component and no one ever thought that a defective part meant that the entire item was defective.

12. Following my resignation from the Department of the Defense in 1955, I practiced law in Washington, D.C. on various bases, part of the time as a single practitioner, part of the time as a joint venturer with Simpson, Thacher & Bartlett of New York City and part of the time as a partner of Trowbridge vom Baur. In September 1966, I became a partner in the New York City, Washington, Paris and London firm of Coudert Brothers and am still engaged in the practice of law with that firm, with offices at 200 Park Avenue, New York, New York 10017. From time to time, I have advised contractors with the various military departments and, since 1966 I have been general counsel to the National Security Industrial Association, a non-profit association of military contractors organized by James Forrestal in World War II to advise, first, the Navy Department and, then, on its formation, the Department of Defense, with respect to the most satisfactory commercial practices and procedures in respect of military procurement. At no time prior to April 11, 1968 have I heard anyone in or out of the Department of Defense suggest that there had been any change in the policy of the assumption of risk by the military departments and the elimination of insurance premiums from contract prices as described above in paragraphs 7 and 11.

DATED: June 4, 1971.

/s/ Hensel
H. Struve Hensel

SUBSCRIBED AND SWORN to before me this 4th day of JUNE, 1971.

SIGNATURE: /s/ Ann Bushong
(Name typed or printed)

Notary Public in and for said County and State.

My Commission Expires:

ANN BUSHONG
Notary Public, State of New York
No. 31-5550300
Qualified in New York County
Commission Expires March 30, 1972

REPLY

BRIEF

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THE BOEING COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA *EX REL.* BRETT ROBY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF

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REPLY BRIEF

The petition demonstrated that the rulings below contravene the plain language of the High-Value Item Clause ("HVIC") and the False Claims Act ("FCA"), conflict with decisions of other courts, and effect a massive shift of business risk from the government to private industry in derogation of longstanding federal policy. Respondents' arguments, notable for what they ignore, do nothing to cast doubt on the worthiness of this case for review by the Court.

I. A. Respondents' arguments cannot be reconciled with – and indeed disregard – the plain meaning, the history, and the purpose of the HVIC. The HVIC provides that "the Contractor *shall not be liable for loss of or damage to* property of the Government (including the supplies delivered under this contract)" due to product defects. 48 C.F.R. § 52.246-24(a) (emphasis added). Respondents claim that the Government should not be deemed to have self-insured against fraud, but the above-quoted language expressly shields the contractor from *any* kind of damages resulting from product defects, with only one exception not involved here: those caused by the "willful misconduct or lack of good faith" by the contractor's most senior management. *Id.* § 52.246-24(a), (b). The HVIC on its face thus necessarily covers damage to high value items arising from fraud or gross negligence by any other contractor employees. As Judge Boggs stated in dissent, "the Government [is] trying to do exactly what the plain and obvious wording of its contractual term says it will not do: recover from 'the Contractor' for the 'loss of or damage to property of the Government.'" Pet. App. 20a.[1]

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[1] The *express* exclusion of senior management misconduct means that there can be no additional *implied* HVIC exclusions, for FCA violations or otherwise. Pet. App. 23a (Boggs, J., dissenting); *see also TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001) (if express exceptions are enumerated, "'additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.'"); *White* v. *Western Title Ins. Co.*, 710

Notwithstanding the HVIC's plain meaning, respondents insist that its limitations do not apply to "liability under sources of law other than the contract itself," U.S. Opp. 8. Remarkably, respondents maintain this position without even mentioning the history of the HVIC. That history shows that the clause purposefully was drafted to shield contractors from paying product-defect damages regardless of the nature of the legal claim asserted. The Defense Department intentionally worded the HVIC "in terms of liability arising from supplies delivered to the Government," rather than referencing specific legal claims, and thus drew "no distinction ... between liability founded in contract and in tort." *Defense Procurement Circular 86*, at 2 (1971) ("*DPC 86*"), C.A. J.A. 435. This is because "fragmentation of the policy of Government self-insurance by numerous exclusions ... is self-defeating because it necessitates some continuation of product liability insurance protection for the risk exposure that the Government has not assumed." 4 U.S. Comm'n on Gov't Procurement, *Report of the Commission on Procurement* 96 (1972), C.A. J.A. 406.

Most fundamentally, when the Government amended the HVIC in 1974, it consciously chose to assume the risk for losses arising from fraud and gross negligence – the very conduct that violates the FCA. As originally drafted, the HVIC expressly excluded not only losses from senior management misconduct and bad faith, but also losses from "fraud or gross negligence as amounts to fraud, on the part of any personnel of the Contractor." ASPR § 7-104.45(b)(1) (1971), *in DPC 86*, at 3, C.A. J.A. 437. Had that exception survived, it would have covered liability for damages under the FCA and for common law fraud. Yet, in response to defense industry comments that companies would be forced to insure against fraud of lower-level personnel and thus increase procurement costs, the Defense Department

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P.2d 309, 314 n.4 (Cal. 1985) (same canon applies to contracts); *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 669 (1979).

eliminated the exception. Pet. 5-6; Br. of National Defense Industry Ass'n ("NDIA") 6-10. Failing even to acknowledge this history, respondents contend that there must be "very clear" contractual language before the Government will be "presumed" to self-insure for losses arising from fraud. U.S. Opp. 9. They cite no authority for such a standard,[2] but in any event it is well satisfied by the crystal clear language of the HVIC, as confirmed by the record of the Department's unmistakable intent. Pet. App. 20a (Boggs, J., dissenting).

Respondents base their argument, not on the operative language of the HVIC that limits contractor liability and defines exemptions, but on the prefatory phrase "notwithstanding any other provision of this contract" that appears in the HVIC, 48 C.F.R. § 52.246-24(a). U.S. Opp. 8. This phrase does not remotely suggest a broad exemption of noncontract damages from the HVIC, much less overcome the rule that exceptions may not be implied beyond those enumerated. It simply clarifies that no warranty or other clause in the contract derogates from the HVIC; this is evident from the predecessor version, which provided that "[n]otwithstanding any other provision of this contract, including specifically the 'Inspection' clause and any 'Warranty of Supplies,' 'Correction of Deficiency' or other warranty clause, the Contractor shall not be liable ...." *DPC 86*, at 4, C.A. J.A. 437. The phrase is intended to prevent contracting officers from undercutting the HVIC by specifying other contract remedies.

Similarly unsound is respondents' reliance on the reference to "contractual liability" in the policy statement of 48 C.F.R.

[2] The authority that exists is to the contrary. *See United States* v. *United States Cartridge Co.*, 198 F.2d 456, 460-61 (8th Cir. 1952) (enforcing broad assumption-of-risk clause nearly identical to the HVIC to preclude FCA liability – notwithstanding that the contract did not expressly reference fraud or the FCA); *United States* v. *Bankers Ins. Co.*, 245 F.3d 315, 324 (4th Cir. 2001) ("The Government should comply with its contractual obligations, and it cannot avoid them merely by invoking a statutory civil claim, such as one contemplated under the FCA.").

§ 46.803(b). First, as Judge Boggs noted, this phrasing "does not appear in the form contract language set out in the regulations, 48 C.F.R. § 52.246-24, or in the parties' contract (which incorporated the form language)." Thus, respondents cannot invoke the policy statement, a form of parol evidence, to vary contract terms. Pet. App. 21a n.1. Indeed, the policy statement itself provides that, if it conflicts with the specific contract term, the contract will control. 48 C.F.R. § 46.803(d). Second, as Judge Boggs further observed, the term "contractual liability" in context means any liability that "arise[s] out of a relationship between the parties that is based in contract." Pet. App. 21a n.1. The FCA liability claimed here undoubtedly arises from the performance of the contract: respondents alleged that Boeing submitted a false claim for payment under a contract because the gears failed to comply with contract specifications.[3]

Giving the HVIC its intended effect also does not "undermine Congress's efforts, in amending the FCA in 1985 and 1986, to combat fraud in military contracting," U.S. Opp. 9. "The HVIC does not overwrite or preempt the FCA by relieving contractors of liability for fraud." Pet. App. 21a (Boggs, J., dissenting). It simply holds the Government to its bargain of assuming the risk of property loss from defective supplies in order to reduce procurement costs, regardless of whether the FCA or any other law authorizes the Government to recover damages for that loss.[4]

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[3] Moreover, the respondents' contrary interpretation is inconsistent not only with the history of the HVIC, Pet. App. 21a n.1. (Boggs, J., dissenting), but also with the drafting history of the policy statement itself. The "contractual liability" language, which did not appear in the prior Department of Defense policy statement, was added at the time of the codification of the FAR simply to "conform to [Office of Federal Procurement Policy] guidelines," and no substantive change was intended. DAR-FAR Comparison Spread Sheet for Part 46, C.A. J.A. 683-85; 46 Fed. Reg. 40,221 (Aug. 7, 1981).

[4] The relator's principal HVIC argument – that a party by contract cannot release or limit rights conferred by statute, but only rights given by

It is notable that the Sixth Circuit, citing the history above, did not embrace the respondents' strained construction of the HVIC as encompassing only liability in contract. Pet. App. 7a-9a. The Sixth Circuit instead implied a more limited exemption for "statutory violations," *id.* at 10a, but its ruling likewise has no colorable warrant in the text or history of the clause, and is in conflict with other circuits. See *supra*, n.2. The disarray reflected in these conflicting Government and judicial interpretations regarding one of the most critical regulations governing major federal procurement contracts underscores the need for this Court's review.

B. Respondents fail to rebut the conflict of decisional authority demonstrated in the petition. The Eighth Circuit held, in direct conflict with the decision below, that where the Defense Department has statutory authority to allocate risk, and has assumed the risk of damages without excluding fraud, a contractual limitation clause must be enforced to limit FCA damages, even though the FCA is not specifically referenced in the contract. *United States* v. *United States Cartridge Co.*, 198 F.2d 456, 465 (8th Cir. 1952). Respondents deny a split, but they rely on distinctions without a difference. They argue that the *Cartridge* contract was authorized by a different statute, but do not contest that the Department's present statutory authority (Pet. 16) is equally broad. They make too much of the Eighth Circuit's emphasis on the "unconventional" Government supervision of the contractor's operations. U.S. Opp. 11. While unconventional in 1940, such supervision is standard now, and the production of the Speco gears here was monitored on-site by Government quality assurance representatives. The exigencies of war did create special liability risks for the contractor in *Cartridge*, 198 F.2d at 463, but the exigencies of modern warfare and modern procurement (hugely expensive, complex weapons

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the contract itself, Roby Opp. 7-10 – is legally wrong. *Shutte* v. *Thompson*, 82 U.S. (15 Wall.) 151, 159 (1872) ("A party may waive any provision, either of a contract or of a statute, intended for his benefit"). *See also United States* v. *Winstar Corp.*, 518 U.S. 839 (1996) (plurality).

systems built by a multitude of contractors and workers) likewise create substantial risks of FCA liability that companies would not assume without costly insurance.

C. The ramifications of the decision below justify certiorari independently of the circuit conflicts. Respondents do not deny that the rule below exposes contractors to potentially billions of dollars of uninsured risk under *existing* contracts. Their pat claim that contractors could not reasonably rely on the HVIC is refuted by its plain meaning and history, by *Cartridge*, and by the *amici curiae*. Respondents also wrongly contend that there is no windfall to the government; it, however, avoided paying contractor charges for insurance costs that otherwise would have been incurred. Nor are respondents' arguments regarding prospective effects persuasive. Their claim that few contractors will be affected by having to bear the risk of liability for "knowing fraud" is disingenuous. The FCA defines "knowing" to include "reckless disregard," which the Government contends is satisfied by gross negligence. Pet. 19. Even the most responsible and prudent contractor cannot completely eliminate the possibility of manufacturing defects in its own operations or those of its suppliers at any tier. Under the Sixth Circuit's interpretation of the HVIC and the FCA, it is but a short leap from such defects to allegations of gross negligence and the threat of treble damages liability under the FCA. That means the contractor must either purchase insurance, raise prices, or exit. Respondents claim it is the Government's prerogative to weigh and allocate those risks, but the government agencies that promulgated the HVIC already did so. The Government may change the policy, but only prospectively (since it cannot abrogate existing contracts) and then, by rulemaking. It remains imperative that this Court resolve the meaning of the HVIC, which is incorporated in every major procurement contract, and which allocates the huge risks associated with

modern weapons, space, and other systems between the government and private industry. See NDIA Br. 10-14.[5]

II. A. The Petition showed that the holding below, that FCA damages are not limited to "the amount wrongfully paid to satisfy the false claim," *United States* v. *Aerodex, Inc.*, 469 F.2d 1003, 1011 (5th Cir. 1972), independently warrants review. Pet. 22-30. Mustering little substantive argument in response, respondents attempt to hide behind their faulty construction of the August 3, 2000 Settlement Agreement as a reason not to decide this issue. Respondents contend that, even if Boeing had won in the Sixth Circuit as to the FCA measure of damages, Boeing nevertheless would have "lost" under the Agreement and would have owed the additional $15 million. See, *e.g.*, U.S. Opp. 13-16. The Government asserts that, consequently, the Sixth Circuit's ruling on FCA damages "does not warrant this Court's review ... because it has no bearing on the proper disposition of [this] case." *Id.* at 14. The relator asserts that this renders the Petition "moot." Roby Opp. 19. These contentions are wrong for several reasons.

First, respondents' construction of the Settlement Agreement is contrary to its plain language. The first clause of the provision they cite – a clause which the Government does not discuss and which the relator does not even *disclose* in the text of his brief – states clearly that Boeing will be deemed to be the "prevailing party" if the court of appeals (or

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[5] The relator's brief brims with invective and outright misrepresentations that are irrelevant to the questions presented. Boeing vigorously denies these accusations. During five years of litigation, no evidence was ever developed supporting the meritless accusation that Boeing knowingly installed defective gears in any aircraft. The dispute concerns whether Boeing adequately supervised a subcontractor's manufacturing and inspection processes. Boeing replaced the few gears found to have microscopic grinding cracks; there has been no mishap involving Speco gears for over a decade; and the Army has since ordered hundreds of additional gears from Boeing made to the same specifications with the same alloy. Moreover, the Honduras mishap referenced by relator (Roby Opp. 3 n.1) did not involve a Speco gear, and the Army found no gear defect.

this Court) holds "that the United States cannot recover damages under the False Claims Act *for loss of a helicopter* resulting from the failure of a defective flight – critical component part." Settlement Agreement ¶ 2.h.i.(a) (Roby App. 8-9) (emphasis added.) Boeing argued below (and argues here) that the Government cannot recover for the loss of the entire helicopter, but instead is limited by the language of the FCA to the amount paid out by reason of the alleged false claim. If this Court agrees, Boeing will indisputably be the "prevailing party" under the Settlement Agreement.

Second, because of the disjunctive "or" between the first and second clauses of ¶ 2.h.i.(a), as long as Boeing is deemed to be the prevailing party under the first clause, discussed above, the meaning of the second clause (on which respondents' arguments are entirely based) is irrelevant.[6]

Third, the mere possibility that the respondents might on remand argue that they have prevailed under the Settlement Agreement (see *id.* ¶ 2.h.iii., Roby App. 10) even if they lose in this Court is not a credible basis for avoiding review of the critical, but plainly incorrect, ruling below.

B. Respondents' other arguments concerning the FCA measure of damages are equally unavailing. For example, while contending that the decision below is consistent with this Court's ruling in *United States* v. *Bornstein*, 423 U.S. 303, 316 n.13 (1976), the respondents make no attempt to refute Boeing's point (Pet. 28-29) that no court, in the 27 years since *Bornstein* was decided, has ever extended the FCA measure of damages articulated in that case to

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[6] In any event, respondents misconstrue the second clause. Boeing did not advocate a position below that would cause it to pay an additional $15 million even if the Sixth Circuit ruled in Boeing's favor. The terms "contract value or price" that parenthetically qualify "value of the helicopter" refer to the contract price of a new helicopter (the measure of damages advocated by respondents, Pet. App. 19a), not to the contract price of the remanufacturing contract. Boeing would prevail under the second clause as well if this Court were to adopt the *Aerodex* rule.

encompass the type and extent of damages that the Sixth Circuit's decision would allow here. Indeed, the relator concedes this point. Roby Opp. 25-26. The FCA is a statute addressing false claims, not products liability.[7]

Moreover, the Government's attempt to distinguish *Aerodex* misses the mark. *See* U.S. Opp. 17-18. *Aerodex* holds that "damages under the False Claims Act must be measured by the amount wrongfully paid to satisfy the false claim." 469 F.2d at 1011. Contrary to the Government's contention (see U.S. Opp. 18), the phrase "[i]n a case of this kind," which qualifies the sentence quoted above, in no way limits the *Aerodex* rule to that one case. Instead, the "kind" of case referred to is an FCA case like this one, in which the Government seeks "consequential damages incurred as a result of the delivery of defective goods." 469 F.3d at 1011.[8]

Relator's Opposition tries to avoid the circuit conflict by suggesting that all FCA cases are limited to their facts: "[n]either the Fifth Circuit in *Aerodex* nor any other court has

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[7] In response to Boeing's position that FCA damages are limited to "recovering money the government was fraudulently induced to pay," (Pet. 25), the relator asserts – without citing any authority – that "[t]his completely misstates the purpose of the FCA." Roby Opp. 21. Boeing's position, however, fulfills precisely the "'chief purpose'" of the FCA damages provision as articulated by this Court: namely, "'to provide for restitution to the government *of money taken from it by fraud*.'" *Bornstein*, 423 U.S. at 314 (emphasis added).

[8] The Government fails even to address Boeing's argument (*see* Pet. 26-28) that Congress, in amending the FCA in 1986, declined to overrule *Aerodex*, and thus declined to make damages like those here recoverable. While the relator suggests that the reasons for deleting the proposed consequential damages provisions are a mystery (Roby Opp. 27-29), this Court recently explained that Congress in 1986 allowed trebling of baseline damages as a "substitute" for consequential damages. *Cook County* v. *United States ex rel. Chandler*, 123 S.Ct. 1239, 1247 n.9 (2003). Neither respondent addresses petitioner's point that the damages allowed by the Sixth Circuit here would exceed even those contemplated by the proposal Congress rejected in 1986, by allowing damages for the loss of the entire helicopter *before* trebling. *See* Pet. 27-28.

either established or even hinted at a 'rule' restricting FCA damages *in every case* to the amount of the false claim." Roby Opp. 17-18 (emphasis added). The Fifth Circuit in *Aerodex*, however, stated: "Upon careful analysis, we hold that the language of the False Claims Act does not include consequential damages resulting from delivery of defective goods." 469 F.2d at 1011. The Ninth Circuit stated in *United States* v. *Woodbury*: "Ordinarily the measure of the government's damages would be the amount that it paid out by reason of the false statements over and above what it would have paid if the claims had been truthful." 359 F.2d 370, 379 (9th Cir. 1966). These courts clearly articulate generally applicable principles intended to extend beyond the four corners of the cases before them. And the principles stated irreconcilably conflict with the Sixth Circuit's erroneous holding in this case.

Relator's central thesis seems to be that the Court should embrace, not resolve, these conflicts; that there are not and should never be any "rules" governing this arena, only "flexibility." Roby Opp. 20-21. To be sure, the determination of damages involves a fact-specific, case-by-case inquiry, but the analysis still must be bounded by clear legal principles that are required by the statutory language and applied uniformly by the federal courts. See Pet. 25 (analyzing statute). The cases cited by relator as exemplars of a desirable "flexibility" (see Roby Opp. 29 & n.20) only underscore the uncertainty, confusion and incentives to forum shop that prevail in this area. This Court, therefore, should clarify what damages are available under the FCA.

CONCLUSION

The petition for writ of certiorari should be granted.

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IN THE
SUPREME COURT OF THE UNITED STATES

The Boeing Company,
Petitioner,

v.

United States of America *ex rel.* Brett Roby,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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RESPONDENT BRETT ROBY'S OBJECTION TO THE MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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I. INTRODUCTION

The Motion by the Chamber of Commerce to file an *amicus curiae* brief supporting Petitioner Boeing should be denied. Despite the mandate of Supreme Court Rule 37.1, the Chamber does not bring new or relevant matter to this Court's attention. Rather, the Chamber either repeats assertions already made by Boeing, or presents arguments that are not relevant to the issues before the Court. In addition, counsel representing the Chamber previously represented in this case a defense-industry lobbyist group, known as the Aerospace Industries Association ("AIA"), that was so closely aligned with Boeing—indeed, Boeing actually guaranteed payment of AIA's legal bills—that the Sixth Circuit twice refused to allow the AIA *amicus* status. The Chamber's proffered *amicus* brief borrows extensively from the AIA's discredited briefs, making clear an inappropriate connection between the two groups.

Given these facts, and in light of this Court's Rule 37.1.b. (which disfavors opposed *amicus* participation at this stage), Respondent Brett Roby respectfully objects to the participation of the Chamber of Commerce as *amicus curiae* in support of Petitioner.

II. THE CHAMBER EITHER REPEATS BOEING'S ARGUMENTS, OR MAKES CLAIMS THAT ARE IRRELEVANT TO THE ISSUES BEFORE THE COURT.

Respondents Roby and the United States brought this False Claims Act case because Petitioner Boeing knowingly sold the Army defective Chinook CH-47D helicopters, yet falsely certified those aircraft as "airworthy." The helicopters were not "airworthy." They contained defective flight-critical transmission gears that could—and did—explode in flight and cause fiery helicopter crashes. One such crash occurred in Saudi Arabia during the final days of Operation Desert Shield, totally destroying the $10 million aircraft and all its contents. Boeing violated the False Claims Act because it submitted claims for payment that falsely represented to the United

States that the helicopters complied fully with all contract requirements when they did not. Boeing took steps to hide this information from the Army.

As a direct, proximate, and foreseeable result of Boeing's representations of quality, conformance and airworthiness, the United States did two things. First, it paid Boeing for the helicopters. Second, it flew the helicopters. But once helicopters containing cracked transmission gears were put into service, the catastrophic failure of that gear and the total destruction of the helicopters were as foreseeable as sunrise. As the Sixth Circuit correctly observed, the defective gear in the Saudi Chinook "was not simply of lesser quality than specified; it was a defective flight-critical part, which made the loss of [the helicopter] inevitable." Petition App. at 16a n.7.

While there were two issues certified by the District Court for appeal, both involving Boeing's efforts to avoid responsibility for the Saudi crash, the Chamber of Commerce purports to address only one in its proffered *amicus* brief: Boeing's claim that the destroyed Saudi Chinook was "consequential" damage and therefore unrecoverable under the False Claims Act. This assertion was rejected by both the District Court and unanimously by the Sixth Circuit, and Boeing's Petition followed. While the Chamber seeks to occupy *amicus curiae* status, on this issue of the appropriate measure of damages under the Act the Chamber offers no new or relevant argument. Instead, with one notable exception not relevant to the Petition, the Chamber merely echos Boeing's arguments.

The first half of the Chamber's proffered *amicus* brief is seemingly devoted to arguing that False Claims Act damages must be limited in all circumstances to the value of the underlying false claim—in this instance, the $4.1 million claim Boeing made for the doomed Saudi Chinook. The Chamber relies mostly on *United States v. Bornstein*, 423 U.S. 303 (1976)

and *United States v. Aerodex, Inc.*, 469 F.2d 1003 (5th Cir. 1972) for the incorrect proposition that False Claims Act damages are capped in all instances by the amount wrongfully paid on the false claim. *Amicus* Brief at 2-8. Were this the sum total of the Chamber's argument, it most certainly represents needless repetition of arguments made by Boeing. *See* Petition at 22-30, and its heavy treatment of both *Bornstein* and *Aerodex*. But the Chamber goes further and tries to revive a claim that Boeing itself abandoned long ago, and which is thus not before this Court.

In the District Court, Boeing asserted that the "amount wrongfully paid" in connection with the destroyed Chinook was the cost of the defective gear—about $10,000. Before the Sixth Circuit, Boeing advocated the same "amount wrongfully paid" position, but conceded that this amount could be the $4.1 million Boeing was paid to rebuild the doomed Chinook. Neither argument comported with this Court's repeated assertion that False Claims Act damages must be measured to make the United States "completely whole,"[1] and the Sixth Circuit paused briefly to dispense with the "value of the gear" argument:

> Negotiation strategy aside, we are at a complete loss as to how Boeing can understand "the amount wrongfully paid" to be limited to "the portion of the contract price allocated to the defective gear." Reply Br. at 21. According to our reading of the contract and the subsequent invoice, Boeing billed the Government for the remanufactured helicopters as units, not as assemblages of assorted parts. The fact that every component but one conformed to contract requirements is not legally significant when the defective gear was "flight critical" and thus necessary for flight.

Petition App. at 15a (*internal citation omitted*). Boeing's Petition for certiorari makes no mention of this "value of the gear" proposition.

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[1] *Cook County v. United States ex rel. Chandler*, 538 U.S. —, —, 123 S. Ct. 1239, —, 155 L. Ed. 2d 247, 256-257 (2003), *quoting United States v. Neifert-White Co.*, 390 U.S. 228, 232, 19 L. Ed. 2d 1061, 88 S. Ct. 959 (1968) (emphasis supplied); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 552 (1943); *Bornstein*, 423 U.S. at 314-15 (*quoting Hess*).

The Chamber, though, tries to re-inject this discredited argument into this case, arguing that False Claims Act damages should be limit as a matter of law to "that portion of the contract price attributable to the defective gear." *Amicus* Brief at 7. While the Chamber clearly misapprehends the False Claims Act and this Court's demand for "make whole" relief, the real problem is that an *amicus curiae* is not permitted to raise irrelevant issues that the parties themselves have not brought before this Court. *See* Supreme Court Rule 37.1.[2] The Chamber's effort to do just that is obviously inappropriate.

In any event, the Chamber's (and Boeing's) effort to limit False Claims Act damages in all instances to the "value of the claim" is unsupported even by the principle cases upon which they rely. *Aerodex* actually focuses on the issue of causation between a false claim and the resulting damages—not, as a matter of law, on the "value of the claim." *See* Respondent Roby's Opposition at 23-29. And this Court in *Bornstein* not only allowed damages that exceeded the value of the false claim, but also noted that such amounts represented "replacement costs" for the faulty tubes at issue. *Bornstein*, 423 U.S. at 314. *Accord United States v. Halper*, 490 U.S. 435, 442-46 (1989) (recognizing that making the Government "completely whole" includes consideration of amounts beyond the false claim such as, for example, investigation costs.) Neither *Bornstein* nor *Aerodex* support the Chamber's (and Boeing's) effort to restrict False

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[2] An *amicus* cannot join issues that have not been joined by the parties in interest. *National Comm'n on Egg Nutrition v. Federal Trade Comm'n*, 520 F.2d 157, 160 n. 3 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978); *In re Buffalo*, 57 A.D.2d 47, 394 N.Y.S.2d 919, 921 (1977); *Phoenix v. Phoenix Civic Auditorium & Convention Ctr. Ass'n.*, 99 Ariz. 270, 408 P.2d 818, 821 (1965) (*amicus* cannot create, extend, or enlarge issue).

Claims Act damages to the "amount wrongfully paid" or the "value of the claim."[3]

Finally, the latter half of the Chamber's *amicus* brief clearly revisits arguments made by Boeing. Therein, the Chamber asserts that "consequential" damages are not recoverable under the False Claims Act—an unexceptional claim that is not in dispute—and then re-defines the helicopter damages at issue in this case as "consequential." *Amicus* Brief at 8-13. This is exactly what Boeing tried to do. Petition at 26-30. Both are wrong. The False Claims Act allows for recovery of all damages sustained "because of the act" that violates the statute. In this case, the prohibited "act" giving rise to Boeing's liability was its false claim that the doomed Saudi Chinook conformed to all contract requirements and was airworthy.

As a direct and foreseeable result of that "act," the Army both paid the $4.1 million claim from Boeing *and began flying a Chinook* that Boeing falsely—and knowingly— represented as airworthy, but that actually would crash soon thereafter. Indeed, neither Boeing nor the Chamber challenge these points, effectively admitting that the Army flew the Chinooks as a direct result of Boeing's false claim, and that the failure of a defective flight-critical component directly causes a Chinook to crash. So the Chamber (and Boeing) tries to avoid these facts. It says that the only thing caused by Boeing's false claim—that is, the only thing the Army did "because of" Boeing's conduct—was pay the bill. *Amicus* Brief at 3-4. But that is not how damages are set by the

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[3] The Chamber also complains that, in setting the value of the Saudi helicopter at zero, the Sixth Circuit "effectively measured the value of the helicopter at the time of the accident[,]" instead of "at the time it was delivered[.]" *Amicus* Brief at 10, n. 4. The Sixth Circuit was not confused. It squarely addressed the issue: "[A] setoff based on value purportedly received would create a perverse incentive system in which government contractors could endanger the lives of American soldiers by providing substandard materiel, and the Army would be deterred from correcting the danger because it would be forced to bear the cost of any use it received from the substandard goods before their defects were discovered." Petition App. at 17a, *quoting United States ex rel. Compton v. Midwest Specialties, Inc.*, 142 F.3d 296, 305 n. 8 (6th Cir. 1998).

terms of the False Claims Act. Congress did not, though it surely could have, constrain damages to the amount paid. Congress decided for case-by-case analysis of damages, with factual development regarding what really occurred "because of" the false claim, and that is exactly what the courts have done.[4]

III. THE CHAMBER IS INAPPROPRIATELY CONNECTED TO A PARTISAN LOBBYIST GROUP AFFILIATED WITH BOEING, AND IS THUS NOT A TRUE "FRIEND OF THE COURT" IN THIS CASE.

The Chamber is represented by counsel of record who appeared in the courts below on behalf of another proffered *amicus curiae*, a defense industry lobbyist group known as the AIA. But the AIA was very closely allied with Boeing, demonstrating an inappropriate partisanship for one seeking to occupy the position of "friend of the court." The Sixth Circuit thus did not grant AIA *amicus* status.[5] This is important because most of AIA's disallowed arguments have been, often verbatim, reproduced by the Chamber and its counsel in its proffered *amicus* brief to this Court.

The AIA is a partisan lobbyist group that includes many of the largest Government contractors.[6] When the issues on appeal were first presented to the trial court, Boeing contacted AIA, rounded up AIA member support, gave AIA a substantive "white paper" that outlined the arguments that Boeing wanted to see in the AIA brief, was in constant contact with AIA during

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[4] *See, e.g., United States v. Killough*, 848 F.2d 1523, 1532 (11th Cir. 1988) (*quoting* S. Rep. 615, 96th Cong., 2d Sess. at 4 (1982)) ("No single rule can, or should be, stated for the determination of damages under the Act...")

[5] *See* Sixth Circuit Case No. 00-4157, Order dated 12/10/02 (denying AIA request to appear as *amicus* supporting Boeing's *en banc* petition). Without comment, the Sixth Circuit did not consider AIA's *amicus* brief when the issues on appeal were first heard.

[6] *See* AIA membership at http://www.aia-aerospace.org/about/members.cfm

the drafting of the AIA brief, and actually *guaranteed* the collection of money to pay fees and costs associated with the brief.[7] Moreover, the AIA's briefing merely repeated assertions made by Boeing, thereby inappropriately inflating the number of pages Boeing could devote to its arguments on appeal. While we learned of this intimate relationship between Boeing and AIA only after the AIA's trial court appearance, we were able to present this evidence to the Sixth Circuit. Suitably informed, that court refused to consider either of AIA's offered *amicus* briefs.

Understandably, the AIA has not tried to appear as *amicus* before this Court. But its counsel has. As a result, the AIA's tainted views have gained voice through the Chamber, a point made clear by the very extensive overlap in the arguments made by each organization. As to the proper measure of damages under the False Claims Act, the AIA argued two points: First, that the helicopter damages at issue in this case were "consequential," and that "consequential" damages are not recoverable under the False Claims Act; and second, that the proper measure of damages in this case should be the value of the defective gear.[8] These are, of course, the precise arguments made by the Chamber—including the "value of the gear" assertion that even Boeing does not raise with this Court.

In addition, in its two *amicus* briefs proffered to the Sixth Circuit, the AIA supported its

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[7] These facts were developed in Relator's Opposition to the Motion by Aerospace Industries Association of America, Inc. For Leave to File Brief as *Amicus Curiae* in Support of Boeing's Petition for Rehearing En Banc at 10-11 (and referenced exhibits) filed with the Sixth Circuit on 11/05/02. Despite aggressive solicitation by Boeing, the Chamber decided not to tender an *amicus* brief below because Boeing was not then a Chamber member. *Id.* at Exhibit F. This obstacle has apparently been overcome.

[8] *See* Brief Of *Amicus Curiae* Aerospace Industries Association of America, Inc. In Support Of Appellant, The Boeing Company (dated 1//29/01) at 19-25; and Brief Of *Amicus Curiae* Aerospace Industries Association of America, Inc. In Support Of The Boeing Company's Petition For Rehearing With Suggestion For Rehearing En Banc (dated 10/25/02) at 5-7.

assertions on these issues with citation to: (a) the False Claims Act; (b) the Senate Report regarding the 1986 amendments; (c) a treatise on damages; and (d) eleven cases. All but two of these authorities were cited by the Chamber in its *amicus* brief.[9] Perhaps more revealing, the Chamber's *amicus* brief often uses the exact same words used by the AIA. For example, footnotes 2 and 3 of the Chamber's *amicus* brief are word-for-word copies of footnotes 16 and 17 from the AIA's first submission to the Sixth Circuit. And the sole block-quotation used by the AIA in the False Claims Act damages section of that brief (at page 22) appears verbatim at pages 5-6 of the Chamber's instant *amicus*.

We will not belabor the point. The Chamber apparently used the rejected AIA's brief as something of a template for the *amicus* it submits to this Court. Since the Sixth Circuit did not allow the AIA's obviously partisan views, we respectfully urge concurrence by this Court regarding the Chamber.[10]

IV. THE CHAMBER IS NOT AN APPROPRIATE *AMICUS CURIAE*.

Participation as *amicus curiae* is a privilege, reserved for those offering a truly impartial perspective not otherwise available to the Court: "The orthodox view of amicus curiae was, and is, that of an *impartial* friend of the court[.]"[11] Unfortunately, the *amicus* privilege has become

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[9] One of these omissions is telling. The Chamber decided not to follow the AIA's lead in citing to this Court's *Marcus* decision, and thus the Chamber was able to avoid confronting this Court's "make whole" language regarding appropriate False Claims Act damages.

[10] It is also worth noting that the Chamber has, independent of any obvious connection with Boeing and the AIA, exhibited hostility towards the False Claims Act. The Chamber recently filed an *amicus* brief in the Fifth Circuit arguing that the *qui tam* provisions are unconstitutional. http://www.uschamber.com/nclc/caselist/issues/falseclaims.htm

[11] *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991) (emphasis in original) (citations omitted).

evermore subject to abuse, a problem recently and succinctly captured by Chief Judge Posner: "The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse."[12] As a result, courts must guard against a true friend of a *party* slipping through disguised as a friend of the *court*. Indeed, this Court discourages *amicus* briefs that do nothing more than repeat (and thus lengthen) arguments already made by a party in the case. "An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored." Supreme Court Rule 37.1.

In this case, the Chamber of Commerce brings no new relevant matters to the Court's attention. Quite the opposite. When the Chamber is not simply repeating arguments made by Boeing, it is trying to raise issues that have long since been removed from this case—and which no party has raised with the Court. Given this, and in light of the Chamber's close connection with a Boeing-controlled lobbyist group that was forbidden from occupying the position of *amicus curiae* in the court below, Respondent Roby respectfully requests that the Court deny the Chamber's motion to participate in this case.

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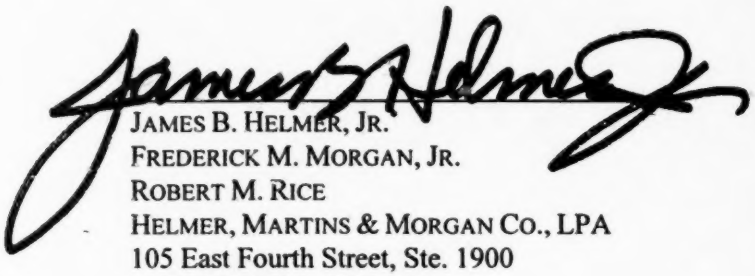
[12] *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997). Chief Judge Posner further wrote that *amicus curiae* briefs "should normally be allowed when a party is not represented competently or is not represented at all . . . or when the amicus has unique information or perspective that can help the court ***beyond the help that the lawyers for the parties are able to provide***." *Id.* (emphasis supplied; citation omitted).

V. CONCLUSION

For the foregoing reasons, the Motion for Leave to File Brief *Amicus Curiae* by the Chamber of Commerce should be denied.

Respectfully submitted,



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REPLY TO RESPONDENT BRETT ROBY'S OBJECTION TO THE MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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I. INTRODUCTION

Respondent Brett Roby's objections to the Chamber of Commerce of the United States of America's ("the Chamber's") participation in this case are unfounded. The motion of the Chamber for leave to file a brief as *amicus curiae* should, therefore, be granted.

First, Respondent Roby argues that the Chamber either repeats Boeing's arguments or raises issues that are irrelevant to the case. The Chamber does not dispute that an *amicus curiae* ordinarily may not introduce issues that were not raised by the parties. An *amicus* may, however, address new matter that is relevant to the issues already before this Court. That is precisely what the Chamber seeks to do in this case. The Chamber's brief addresses the second issue in Boeing's petition, namely, "[w]hether the court below erred in holding . . . that damages recoverable under the False Claims Act, before trebling, are not limited 'to the amount wrongfully paid to satisfy the false claim.'" Boeing's Petition at i. The Chamber augments the arguments of Boeing by citing new authorities, elaborating on others and presenting a new perspective on the amount that was wrongfully paid to satisfy the alleged false claim in this case. In addition, as the voice of a multitude of American businesses, the Chamber shows that the issues addressed in Boeing's petition for certiorari transcend the parties.

Second, Respondent Roby seeks to challenge the Chamber's participation by smearing the Aerospace Industries Association of America ("AIA"), distorting the record of AIA's participation in this case, and trying to convince this Court that AIA and the Chamber are essentially the same organization, a suggestion that is ludicrous on its face. AIA is a trade association with approximately 75 members in a single industry. The Chamber is the world's largest business federation, representing more than 3 million businesses and business organizations of every size, industrial sector, and geographic region. Although the interests of

the Chamber and AIA sometimes coincide, the two organizations often have different agendas. Indeed, when the AIA submitted *amicus* briefs below, it addressed both the High Value Items Clause and the measure of damages issues, but focused mainly on the High Value Items Clause because that issue was extremely important to AIA's members. In contrast, the Chamber declined to participate below and now addresses only the broader, measure of damages issue, which is more important to the Chamber's members than is the High Value Items Clause issue.

Finally, the facts that the Chamber is represented by the same counsel that represented AIA below and raised some of the same arguments raised by AIA are irrelevant to whether the Chamber is a proper *amicus* party. Neither AIA nor Boeing participated in the Chamber's decision to submit this brief or provided any financial or editorial assistance in its preparation.

II. THE ROLE OF AN *AMICUS CURIAE* IS TO AUGMENT THE ARGUMENTS RAISED BY THE PARTIES AS THE CHAMBER HAS DONE IN THIS CASE.

Rule 37.1 of this Court provides that "[a]n *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court." Consequently, it was proper for the Chamber to address new matter and to bring a new perspective on the issue of damages that was raised in Boeing's petition. The fact that the Chamber posits a new legal theory on the method of calculating damages that was not raised by Boeing is of no moment. This Court has previously addressed arguments raised by an *amicus* even if not raised by the parties. *See, e.g.*, *White v. Illinois*, 502 U.S. 346, 352 (1992) ("We consider as a preliminary matter an argument not considered below but urged by the United States as *amicus curiae* in support of respondent"). Indeed, "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper

construction of governing law." *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 99 (1991). Thus, the Chamber seeks only to fill the role of an *amicus* by addressing matters that will help the Court to properly dispose of the issues raised in this case.

III. THE CHAMBER IS AN APPROPRIATE *AMICUS CURIAE*.

The fact that the Chamber is represented by counsel who represented AIA below does not make the Chamber's brief improper. Nothing in this Court's rules prevents an *amicus* from retaining counsel who has represented another party on the same issue below. Indeed, *amici* often find it advantageous to retain counsel who are already familiar with the facts and law involved in the case.

Similarly, the fact that the Chamber makes some of the same arguments that were made by AIA below does not make the Chamber's brief improper. Nevertheless, the Chamber's brief does not merely repeat AIA's arguments. First, AIA focused on the High Value Items Clause whereas the Chamber addresses only the measure of damages under the False Claims Act. Second, while the Chamber cites many of the authorities cited by AIA in its damages argument, the Chamber cites additional authorities as well. For example, AIA did not rely on *Cook County, Ill. v. United States ex rel. Chandler*, 123 S. Ct. 1239 (2003); 1 J. White & R. Summers, *Uniform Commercial Code*, § 10.4 (4th ed. 1995); *Black's Law Dictionary* (7th ed. 1999); or the *Restatement (Second) of Torts* (1976). These authorities are, however, an integral part of the Chamber's brief.

Likewise, the fact that the *en banc* Sixth Circuit rejected AIA's *amicus* brief is irrelevant to whether this Court should accept the Chamber's *amicus* brief. First, the *en banc* Sixth Circuit provided no rationale when it denied AIA's motion. Thus, it is mere speculation on Respondent

Roby's part as to why AIA's motion was denied.[1] Indeed, according to AIA, and contrary to Respondent Roby's contentions, "AIA is not the 'alter ego' of The Boeing Company; AIA made an independent determination that it was important to the collective interest of all of AIA's members to file *amicus* papers on the issues raised in [the Sixth Circuit]; [and] Boeing did not 'guarantee' payment of AIA's legal expenses below . . ." Reply to Roby's Opposition to the Motion by AIA for Leave to File a Brief as *Amicus Curiae* in Support of The Boeing Company's Petition for Rehearing and Suggestion for Rehearing En Banc (dated November 11, 2002) at 1. Rather, nine AIA member companies, other than Boeing, financed the brief. *Id.* at 4 n.4. Second, regardless of the Sixth Circuit's rationale for rejecting AIA's motion for leave to file an *amicus* brief in support of Boeing's petition for rehearing, the Sixth Circuit's ruling is not binding on this Court. Third, and more importantly, it is the Chamber, not AIA, that seeks to file an *amicus* brief in this Court. Thus, Roby's arguments about AIA are a red herring.

Turning to the Chamber, the Chamber is an appropriate *amicus curiae*. As noted above, the Chamber brings to this Court relevant matter that was not presented by the parties. In addition, the Chamber has a unique position in the business community and is, therefore, able to show the Court that this case is critical not only to Boeing but to many American businesses. Finally, neither Boeing nor its counsel provided input or financial support for the preparation and submission of the Chamber's *amicus* brief.

Moreover, notwithstanding Roby's contentions, an *amicus* is not required to be a disinterested or impartial party. *See, e.g., Funbus Systems, Inc. v. California Public Utilities Comm'n*, 801 F.2d 1120, 1125 (9th Cir. 1986). Indeed, *Ryan v. Commodity Futures Trading*

[1] As for the panel, the panel never ruled on AIA's motion, and hence, did not, as Roby contends, deny it.

Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997), a case relied on by Roby himself, acknowledges that no *amicus* brief is filed on a neutral basis, but rather, usually supports one of the litigants in the case. In this case, the Chamber has an interest in the outcome of this case because its members are exposed to enormous and often unwarranted damages by virtue of their contractual relationships. The Sixth Circuit's decision, which obfuscates the distinction between direct and consequential damages, exacerbates the Chamber's members' ability to manage those risks through the inclusion in their contracts of clauses excluding consequential damages.

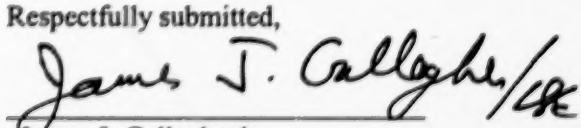
Had the Chamber not sought leave to file an *amicus* brief, Roby would likely have argued, as he did below, that the Chamber does not support Boeing's position. *See* Motion of the Chamber for Leave to File Brief as *Amicus Curiae* at 1 (*quoting* Roby's Opposition to the Motion by Aerospace Industries Association of America, Inc. for Leave to File Brief as *Amicus Curiae* in Support of Boeing's Petition for Rehearing *En Banc*). Ironically, now that the Chamber seeks to file a brief to dispel that notion, Roby tries to prevent it.

IV. CONCLUSION

Because there is no legitimate basis to object to the filing of the Chamber's brief and because the Chamber brings to the Court's attention new matter relevant to the Court's consideration of Boeing's petition, the Chamber's motion should be granted.

Dated: June 9, 2002

Respectfully submitted,



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